IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. ~~79-87~~

CONTRACTORS AND BUILDERS ASSOCIATION OF PINELLAS COUNTY, a Florida corporation, HALLMARK DEVELOPMENT COMPANY, INC., a foreign corporation licensed to do business in the State of Florida, KENNETH A. MARRIOTT, VERNON M. MILLER, and GEORGE C. WAGNER,
*Petitioners,*

*vs.*

THE CITY OF DUNEDIN, FLORIDA,
a municipal corporation,
*Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEALS OF THE STATE OF FLORIDA, SECOND DISTRICT**

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## CITATION OF AUTHORITIES





## CITATION OF AUTHORITIES—Continued



### STATUTES

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## PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, SECOND DISTRICT

The petitioners, CONTRACTORS AND BUILDERS ASSOCIATION OF PINELLAS COUNTY, a Florida corporation, HALLMARK DEVELOPMENT COMPANY, INC., a foreign corporation licensed to do business in the State of Florida, KENNETH A. MARRIOTT, VERNON M. MILLER, and GEORGE C. WAGNER, pray that a writ of certiorari issue to review the opinion and judgment of the District Court of Appeal of the State of Florida, Second District, rendered in these proceedings on May 5, 1978, Reh. Den. June 6, 1978; Cert. Den. by Florida Supreme Court April 24, 1979.

## OPINIONS BELOW

The first opinion of the Circuit Court of Pinellas County appears in the Appendix at pages A-13 - A-18. The first opinion of the District Court of Appeal of the State of Florida, Second District, appears in the Appendix at pages A-19 - A-23. The opinion of the Supreme Court of the State of Florida appears in the Appendix at pages A-24 - A-32. The second opinion of the Circuit Court for Pinellas County appears in the Appendix at pages A-33 - A-38. The second opinion of the District Court of Appeal of the State of Florida, Second District, appears in the Appendix at pages A-39 - A-41. The order of the Supreme Court of Florida denying certiorari from the second opinion of the District Court of Appeal of the State of Florida, Second District, appears in the Appendix at page A-51.

## JURISDICTION

The opinion or judgment of the District Court of Appeal of the State of Florida, Second District, was entered on May 5, 1978, with rehearing being denied June 6, 1978. Thereafter, petitioners exhausted their state appellate remedies by filing a petition for writ of certiorari in the Supreme Court of Florida which petition was denied on April 24, 1979. This petition for certiorari was filed less than 90 days from the denial by the Supreme Court of the State of Florida of petitioners' petition for writ of certiorari to review the District Court's opinion. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), in that petitioners' rights, privileges, and immunities under the United States Constitution were claimed in the proceedings below and ruled upon by the District Court of Appeal of the State of Florida, Second District.



## QUESTIONS PRESENTED

Petitioners have brought suit to require the refund of impact fees or assessments charged for the apparent purpose of constructing water and sewer facilities for use by other municipal residents or utility customers. The questions thereby arising are:

1. Whether respondent, THE CITY OF DUNEDIN, once having its impact fee ordinance declared to be illegal under which it had collected from petitioners connection fees for *alleged* water and sewer capital improvements could enact a new ordinance *retroactively* charging petitioners the same connection fees (recouping fees already charged and held) in contravention of petitioners' rights under the 14th Amendment to the United States Constitution and Article 1, Section 10, of the United States Constitution.

2. Whether petitioners have been arbitrarily denied equal protection of the laws under the 14th Amendment to the United States Constitution in being required to pay disproportionate and unequal impact fee assessments for customers of water and sewer facilities which will never be used by petitioners.

## CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article 1, Section 10:

> "No state shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debt; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."

Constitution of the United States, Amendment 14, Section 1:

> "...nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF FACTS

The facts of this case extend over numerous trials and appellate decisions. On February 2, 1973, petitioners filed a declaratory judgment action which included members of the CONTRACTORS AND BUILDERS ASSOCIATION OF PINELLAS COUNTY, INC. seeking to declare respondent's impact fee ordinance illegal. The material provisions of the ordinance stated:

"Sec. 25-14. *Sewage connection required; notice.*

"The owner of any house, building, or property used for human occupancy, employment, recreation, or other purpose, situated within the city and abutting on any street, alley or right-of-way in which there is now located or may in the future be located a public sanitary or combined sewer of the city, is hereby required at his expense to install suitable toilet facilities therein, and to connect such facilities directly with the proper public sewer in accordance with the provisions of this chapter, within ninety (90) days after date of official notice to do so, provided that said public sewer is within two hundred (200) feet of the house, building, or properties used for human occupancy.

"At the time of connection to the proper public sewer, if a septic tank has been abandoned, the owner is hereby required, at his expense, to have said septic tank pumped dry, filled to the rim with suitable fill material or excavated and disposed of and properly backfilled. * *"

"Sec. 25-31. *Same—Classes of permits; contents; inspection fees.*

"There shall be two classes of building sewer permits: (1) for residential and commercial service; and (2) for service to establishments producing industrial waste. In either case, the owner or his agent shall make application on a special form furnished by the city. The permit application shall be supplemented by any plans, specifications, or other information considered pertinent in the judgment of



the city sewer superintendent. *No permit will be issued unless the assessment as set forth in section 25-71(c) and (d) has been paid.* * *" (Emphasis supplied)

"Sec. 25-32. *Same—Costs paid by owner.*

"All costs and expense incident to the installation, connection and maintenance of the building and collector sewers shall be borne by the owners. The owners shall indemnify the city from any loss or damage that may directly or indirectly be occasioned by the installation of the building sewer. * *"

"Sec. 25-71. *Meters—Connection or installation charge.*

"(a) The connection charge for the installation of a meter inside the city shall be as follows:

| | | |
|---|---|---|
| 5/8" | meter | $ 95.00 |
| 1" | meter | 170.00 |
| 1-½" | meter | 265.00 |
| 2" | meter | 360.00 |

"(b) The connection charge for the installation of a meter outside the city limits shall be as follows:

| | | |
|---|---|---|
| 5/8" | meter | $105.00 |
| 1" | meter | 180.00 |
| 1-½" | meter | 290.00 |
| 2" | meter | 390.00 |

"(c) In addition to the meter installation charges described herein, there shall be paid an assessment to defray the cost of production, distribution, transmission and treatment facilities for water and sewer provided at the expense of the City of Dunedin, as follows:

| | |
|---|---|
| Each dwelling unit; for water | $325.00 |
| for sewer | 475.00 |
| Each transient unit; for water | 150.00 |
| for sewer | 275.00 |
| Each business unit; for water | 325.00 |
| for sewer | 475.00 |

"(d) The assessments as set forth herein shall be payable upon issuance of the building permit for said unit or units in the case of new construction, or in the case of a presently existing structure or structures, such assessments shall be payable when the permits for water or sewer connections are issued. * *"

The complaint[1] attacked the ordinance upon three basic grounds: the ordinance was enacted without legislative authority; the ordinance was an invalid special assessment; the ordinance imposed assessments which exceeded the benefits conferred upon the property assessed, constituted general taxation of a particular group for the benefit of a larger group or in this case the entire citizenry of the City of Dunedin in violation of the equal protection and due process clauses of both the State and Federal Constitutions.

After a lengthy trial, the trial judge entered an opinion[2] finding that respondent lacked authority to enact the impact fee ordinance and refusing to rule upon the constitutional questions raised:

"Unfortunately, the fee under attack is not a 'reasonable charge' as contemplated by the aforesaid statutes, but in effect is an effort to provide assessments for construction of a system in a manner prohibited by law. * *" (A-16)

Respondent appealed to the District Court of Appeal of the State of Florida, Second District, which on April 30, 1975, filed an opinion[3] reversing the lower court's decision holding that the municipality had legislative authority to enact the ordinance. The District Court concluded:

"Our greatest concern in this case was whether the funds collected as a result of the fees were clearly earmarked for capital expansion. The language of the ordinance does not

1. (A 1-12)
2. (A 13-18)
3. (A 19-23)



unequivocally mandate the use of the funds for capital improvements. Yet, the evidence shows that the fees were established for this purpose, and the City has steadfastly handled the funds separately with a view towards expending the monies only for improvements to the respective systems. In this regard, we are assisted by the finding of the Court below 'that the proceeds derived from the $700.00 connecting fees are earmarked by the City for capital improvements to the systems as a whole.' Clearly, the use of such funds must be so limited, and in view of the position taken by the City in this litigation, any use of the funds contrary to these purposes would be subject to appropriate legal sanction.

At the trial, the appellees also attacked the ordinances on constitutional grounds. The Judge did not pass on the constitutional questions because, having determined that the fee was attached which was beyond the authority of the City to assess, he deemed it unnecessary to do so. What we have already said adequately disposes of the constitutional questions. We believe the ordinances are constitutional and do not unlawfully discriminate against newcomers as asserted by appellees. The fees are payable by every person who hereafter connects into the City's water or sewer system, even if he has lived in the City all of his life and his property is the heart of the City." *City of Dunedin v. Contractors and Builders Association of Pinellas County*, 312 So.2d 763, at 766-767, (Fla. 2nd D.C.A. 1975).

Thereafter, the District Court certified its opinion to the Supreme Court of Florida. On February 25, 1976, the Supreme Court of Florida filed an opinion[4] *quashing* the District Court's opinion, establishing guidelines for the validity of impact fee ordinances, holding that the ordinance in question was invalid for not containing a sinking fund and requiring the funds to be expended for capital improvements and holding:

"The cost of new facilities should be borne by new users to the extent new use requires new facilities, *but only to that*

4. (A 24-32)

*extent*. When new facilities must be built in any event, looking only to new users for necessary capital gives old users a windfall at the expense of new users.

When certificates of indebtedness are outstanding, new users, like old users, pay rates which include the costs of retiring the certificates, which represent original capitalization. *State v. City of Miami, supra*. New users thus share with old users the cost of original facilities. For purposes of allocating the cost of replacing original facilities, it is arbitrary and irrational to distinguish between old and new users, all of whom bear the expense of the old plant and all of whom will use the new plant. *The limitation on the use of the funds, shown to exist de facto* in the present case, has the effect of placing the whole burden of supplementary capitalization, including replacement of full depreciated assets, on a class chosen arbitrarily for that purpose." *Contractors and Builders Association of Pinellas County v. City of Dunedin*, 329 S.2d 314, at 321, (Fla. 1976) (Emphasis by underlining)

The Supreme Court then went on to state in its opinion an unusual holding by a Court apparently inviting retroactive enactment of a new ordinance:

"Nothing we decide, however, prevents Dunedin from adopting another sewer connection charge ordinance, incorporating appropriate restrictions on use of the revenues it produces. Dunedin is at liberty, moreover, to adopt an ordinance restricting the use of monies already collected. We pretermit any discussion of refunds for that reason.

The decision of the District Court of Appeal is quashed and the case is remanded to the District Court with directions that the District Court dispose of the question of costs; and that the District Court thereafter remand for further proceedings in the trial court not inconsistent with this opinion. *In the trial court's consideration de novo* of the question of refunds the Chancellor is at liberty to take into account all pertinent developments since the entry of his original decree." (Opinion at 322) (Emphasis by underlining)



The litigation was thus reestablished in the Circuit Court of Pinellas County, Florida. Again, after trial, the trial court filed an opinion holding that petitioner's rights to a refund were vested rights, that a new ordinance enacted by petitioners could not be utilized to retroactively capture the funds already collected by the City under its previously enacted invalid ordinance and further holding that *since plaintiffs were paying their proportionate share of a sewer and water bond issue, collection of impact fees from them for construction of improvements and facilities which would never be used by petitioners constituted inequitable and unequal treatment of the laws in violation of the guidelines established by the Supreme Court in its decision in the case sub judice*. (A 33-39) The Court, in holding that the funds could not be recaptured, held that the enactment of the new ordinance attempting to recoup funds already assessed under an illegal ordinance was in violation of the 14th Amendment to the United States Constitution and Article 1, Section 10, of the United States Constitution, as expressed by Judge Driver in the Supplemental Judgment entered in this case:

"This Court is concerned with the question of whether the City by enactment of an ordinance can take from a private party moneys which were due at the time the ordinance was enacted. This question parodies one posed by Mr. Justice Holmes, United States Supreme Court, in FORBES PIONEER BOAT LINE vs. BOARD OF COMMISSIONERS, 258 U.S. 338, 66 L.Ed. 647, (hereinafter cited as FORBES PIONEER). The facts and issues of law between the case now before this Court and the one before the court in Forbes Pioneer are of rare and striking similarities. In Forbes Pioneer plaintiff operated passenger boats over a system of publicly owned canals in and around Lake Okeechobee and South Florida. The Board of Commissioners to operate the canal constructed locks, which plaintiff's boats had to pass through. To help defray the cost of operating and maintaining the locks the Commissioners imposed a fee for passage. This fee was protested and an action brought in the Circuit Court in Dade County. The law suit was prosecuted on the theory that the legislative Act creating the canal district did not contain authority to collect fees for the use of the canals and improvements.

Plaintiff Forbes Pioneer appealed an adverse judgment in the Circuit Court to the Supreme Court of Florida. The Supreme Court of Florida in FORBES PIONEER BOAT LINE vs. EVERGLADES DRAINAGE DISTRICT, 77 Fla. 742, 82 So. 346, declared that the canal commission was without authority to impose and collect the fee under the Act creating the canal authority. The same day the Supreme Court of Florida knocked out the right of the Commissioners to collect fees, the State legislature, which was in session, attempted to correct the situation and enacted into law Chapter 7865, Acts of 1919, which purportedly validated the collection of fees which had theretofore been made and which the Supreme Court of Florida had declared was done without authority. The Act in addition to validating collections previously made undertook to prescribe the use and disposition of toll fees for the use and improvement of the canal system. Consequent upon the mandate of the Supreme Court, the matter reverted to the trial court where FORBES PIONEER sued to recover the moneys which had been unlawfully extracted from it as tolls. The Commission asserted as a defense to the refund Chapter 7865, Acts of 1919, supra. The trial Court entered judgment for plaintiff awarding a refund of the tolls which had been collected without authority.

This latter judgment was again appealed to the Supreme Court of Florida. The Supreme Court reversed the judgment in favor of plaintiff, holding that the legislature had the power by the enactment of Chapter 7865 to retroactively validate the collection of those tolls previously made. BOARD OF COMMISSIONERS EVERGLADES DRAINAGE DISTRICT vs. FORBES PIONEER BOAT LINE, 80 Fla. 252, 86 So. 199.

Notwithstanding only $649.21 was involved, Forbes Pioneer took an appeal to the United States Supreme Court. FORBES PIONEER BOAT LINE vs. BOARD OF COMMISSIONERS EVERGLADES DRAINAGE DISTRICT, supra.

The United States Supreme Court reversed the Florida court pointing out that while the Florida court had relied on UNITED STATES vs. HEINZEN, 206 U.S. 370, 51



L.Ed. 1098, 27 S.Ct.Rep. 742, in doing so the Florida court had exceeded the reach of HEINZEN and in so doing had committed error.

The United States Supreme Court discussing the extent to which unlawful Acts may be ratified by legislation retrospective in nature pointed out:

But, generally, ratification of an act is not good if attempted at a time when the ratifying authority could not lawfully do the act. BIRD vs. BROWN, 4 Exch. 786, 154 Eng.Reprint 1433, 19 L.J. Exch. N.S. 154, 14. Jur.132, 23 Eng.Rul. Cas. 422. If we apply that principle this statute is invalid. For if the legislature of Florida had attempted to make the plaintiff pay in 1919 for passages through the lock of a canal that took place in before 1917, without any promise of reward, there is nothing in the case as it stands to indicate that it could have done so any more effectively than it could have made a man pay a baker for a gratuitous deposit of rolls.

It was further pointed out that the policy of permitting retroactive legislation was founded upon this principal:

In those cases it is suggested that the meaning simply is that constitutional principles must leave some play to the joints of the machine. But courts cannot go very far against the literal meaning and plain intent of a constitutional text.

The holding of Forbes Pioneer has been cited favorably by the Florida courts. BEDELL vs. LASSITER, 196 So. 699; PETITION OF ROCAFORT, 186 So.2nd 496.

The facts and principles in the case under consideration is an overlay of those found in Forbes Pioneer.

In Forbes Pioneer there was a charge imposed for use of a public owned facility, i.e., locks and canal waters; in this case a fee was imposed for the use of a publicly owned facility, i.e., Sewer and Water System of Dunedin; in Forbes Pioneer legislative authority to impose tolls was found lacking; in this case the ordinance authorizing the impact fee was found lacking; in Forbes Pioneer an action to obtain a refund of unlawfully paid tolls was brought and

judgment entered for plaintiff; in this case judgment was entered entitling plaintiffs to a refund of impact fees unlawfully collected; in Forbes Pioneer legislation was enacted to ratify tolls which had been unlawfully collected and to prescribe their use; in this case Ordinances 74-19 and 76-19 have been enacted, purportedly to retroactively ratify the unlawful collection of the impact fees.

The same Constitution which the Supreme Court relied upon to reverse the judgment denying refund to the Boat Company in Forbes Pioneer is still viable and applicable to the issue before this Court. This Court being persuaded that the issues before it are controlled by the principles in Forbes Pioneer, supra, it necessarily follows that the enactment of Ordinances 74-19 and 76-19 cannot justify denying to plaintiffs their right to a refund of the impact fees paid under protest.

One additional facet of the issue is worthy of comment. It has been suggested by some authorities, notably HUTTON vs. AUTORIDAD SOBRE HOGARES DE LA CAPITAL, 78 F.Supp. 988, that only those rights which have become vested are immune from impairment from retroactive legislation which ratifies the unlawful collection of funds. In this case the Court finds that plaintiffs' rights to refund became *vested* prior to the enactment of Ordinances 74-19 and 76-19 and were firmly fixed by the judgment which had been entered in this Court.

Though not necessary, it is appropriate to pass upon one other issue raised by the parties.

Explicit in the mandate of the Court in this action is the rule that the new users of a utility should be charged only a fair and equitable share for the cost of the improvements and what is fair and equitable is to be gauged by the increased demands by the new users and that the improvements required by the new users must be specifically earmarked to justify collection of fees different from existing users.

This Court finds from the proofs before it that all of the improvements which the impact fees in issue were collected for are now in existence and are being paid for from the



proceeds of a bond issue floated by the City of Dunedin. The disputed impact fees are in escrow and have not been spent, contrary to previous suggestions that they had been used in part to purchase the DYNAFLOW SYSTEM. Plaintiffs are paying their proportionate share of the bond issue as are the old users of the municipal water and sewer system. PATENTLY, THE FUNDS COLLECTED FROM THE IMPACT FEES WHICH ARE NOW IN ESCROW WILL NOT BE USED FOR CONSTRUCTION OR IMPROVEMENT OF FACILITIES BEING USED BY PLAINTIFFS, BUT WILL NECESSARILY BE APPLIED TO OTHER PROJECTS. THESE FACTS INVALIDATE THE REQUIREMENTS SET FORTH BY THE SUPREME COURT IN UPHOLDING A VALID IMPACT FEE.

It may be argued that the City advanced the moneys through the bond issue to pay in part for the projects for which the impact fees had been collected. This is sheer rationalization and will not justify departure from the stringent requirements laid down by the Supreme Court; * *" (Emphasis supplied)

Again, respondents appealed to the District Court of Appeal of the State of Florida, Second District. Again, the District Court reversed in an opinion[5] entitled *The City of Dunedin v. Contractors and Builders Association of Pinellas County*, 358 So.2d 846 (Fla. 2nd D.C.A. 1978), TOTALING IGNORING AND REFUSING TO RULE UPON THE QUESTION OF THE LOWER COURT'S FINDING AS THE TRIER OF FACT THAT PETITIONERS HAD BEEN DENIED EQUAL PROTECTION SINCE PETITIONERS WERE BEING REQUIRED TO PAY FOR CAPITAL IMPROVEMENTS ONCE THROUGH PAYMENT OF REVENUE BONDS AND ONCE THROUGH THE PAYMENT OF IMPACT FEES. The District Court also held the *Forbes Pioneer Boat Line* case, supra, to be inapplicable:

"* * However, the trial court also stated that the enactment of Ordinances 74-19 and 76-19 could not justify

5. (A 39-41)

denying appellees their right to a refund of the impact fees they had previously paid under protest. For authority, the trial court cited *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338, 42 S.Ct. 325, 66 L.Ed. 647 (1921).

Further, the trial court wrote in its supplemental judgment that "though not necessary, it is appropriate to pass upon one other issue raised by the parties" and made the finding that all of the improvements for which the impact fees in issue were collected are now in existence and are being paid from the proceeds of the bond issue floated by the City in 1974. This appeal ensues.

There is no question that a municipality may now impose "impact fees." The only question we have before us now is whether or not those appellees who paid impact fees under protest are entitled to a refund.

The supreme court's decision in *Contractors, supra*, is the law of the case. Consequently, we affirm that portion of the judgment finding the ordinances legally sufficient to permit the City to impose and collect impact fees; however, we reverse that portion of the judgment which orders a refund of impact fees paid under protest.

The *Forbes* case, is inapplicable to the case *sub judice*. The *Forbes* case involved the unlawful exaction of tolls by a drainage district from persons utilizing the lock of a canal. As the litigation to recover the fees so collected progressed, the Florida Legislature passed an act that purported to validate their collection. However, the United States Supreme Court held that ratification of an act is not good if attempted at a time when the ratifying authority could not do the act. In other words, the drainage district was *without authority* to exact a charge for the passage of the plaintiff's boat through the canal, and the United States Supreme Court held that the authority could not be later conferred retroactively by the State Legislature so as to permit the drainage district to keep the charge exacted from plaintiff.

On the contrary, in instant case the City of Dunedin initially had the authority to exact an impact fee and, further, we are very much persuaded by the words of Mr. Justice Hatchett in *Contractors, supra*, wherein he wrote "...Nothing we decide, however, prevents Dunedin from adopting another sewer connection charge ordinance, incorporating appropriate restrictions on use of the revenues it produces. Dunedin is at liberty, *moreover*, to adopt an ordinance restricting the use of moneys *already* collected. We pretermit any discussion of refunds for that reason." [Emphasis ours] 329 So.2d 314 at 322.



The very question of refunds was before the Florida Supreme Court at the time it issued its decision. Had the Supreme Court wished to order a refund of these impact fees to appellees then, it would have done so at that time. However, it pretermited this question to allow the City to adopt an ordinance restricting the use of the moneys *already* collected. Although Mr. Justice Hatchett also indicated that during the trial court's consideration *de novo* of the question of refunds the chahcellor was at liberty to take into account all pertinent developments since entry of his original decree, we are of the opinion that the City has followed the directions of the supreme court explicitly. It has specifically earmarked the impact funds for the water and sewer system expansion. Those funds may now be used for the purposes of further expansion or retiring bonds issued for the earlier [post-1974] expansion of the system.

Consequently, that portion of the chancellor's supplemental judgment ordering the return of the fees to those persons paying under protest is REVERSED.

Petitioners filed a timely petition for rehearing[6] which was denied by the District Court on June 6, 1978.[7] Petitioners filed a timely petition for writ of certiorari in the Supreme Court of Florida which was denied on April 24, 1979.[8] Petitioners have now filed a timely petition for writ of certiorari in the Supreme Court of the United States.

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6. (A 42-49)
7. (A 50)
8. (A 51)

## REASONS FOR GRANTING THE WRIT

1. THE RESPONDENT CANNOT RETROACTIVELY PASS LEGISLATION RECOUPING IMPACT FEES COLLECTED BY ASSESSMENT UNDER AN ILLEGAL ORDINANCE IN CONTRAVENTION OF PETITIONERS' RIGHTS UNDER ARTICLE 1, SECTION 10, AND THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION AS PETITIONERS' RIGHTS WERE VESTED AT THE TIME OF ENACTMENT OF THE RETROACTIVE ORDINANCE AND THE RESPONDENT LACKED INITIAL AUTHORITY TO ENACT AN ORDINANCE "DOUBLY CHARGING" PETITIONERS FOR CAPITAL IMPROVEMENTS.

The basic facts which control this decision are that the trial Judge, as *trier of the facts*, found that petitioners' rights became "VESTED" under law prior to the enactment of respondent City's ordinance attempting to retroactively recoup assessed funds:

> "One additional facet of the issue is worthy of comment. It has been suggested by some authorities, notably, *Hutton v. Autoridad Sobre Hogares De La Capital*, 78 F.Supp. 988, that only those rights which became vested are immune from impairment from retroactive legislation which ratifies the unlawful collection of funds. In this case, the Court finds that plaintiff's rights to refund became vested prior to the enactment of Ordinances 74-19 and 76-19 and were firmly fixed by the judgment which had been entered in this Court." (A-37)

The question posed to the District Court was not as it stated in its opinion — whether respondent had the technical power to enact a valid ordinance for assessment of impact fees at the time of its enactment of its initial ordinance but whether such retroactive legislation could retroactively impair petitioners VESTED rights. The District Court *did not* address this point.



Prima facie reading of Article 1, Section 10, and the 14th Amendment of the United States Constitution clearly demonstrates the congressional intent to prohibit the type of retroactive legislation attempted in this case. Under Florida law, petitioners' rights became VESTED at the time of payment under protest and the filing of suit. *City of North Miami Beach v. Trebor Construction Corp.*, 296 So.2d 490 (Fla. 1974); *Heinzman v. U.S. Home of Florida, Inc.*, 317 So.2d 838 (Fla. 2nd D.C.A. 1975); *Gables v. Sakolsky*, 215 So.2d 329 (Fla. 3rd D.C.A. 1968). After such vesting, petitioners' rights were protected by the constitutional prohibition afforded in *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338, 66 L.Ed. 647 (1922), as the trial Judge held:

> "In Forbes Pioneer, there was a charge imposed for use of a publicly owned facility, i.e., locks and canal waters; in this case, a fee was imposed for the use of a publicly owned facility, i.e., sewer and water system of Dunedin; in Forbes Pioneer, legislative authority to impose tolls was found lacking; in this case, the ordinance authorizing the impact fee was found lacking; in Forbes Pioneer, an action to obtain a refund of unlawfully paid tolls was brought and judgment entered for plaintiff; in this case, judgment was entered entitling plaintiff to a refund of impact fees unlawfully collected; in Forbes Pioneer, legislation was enacted to ratify tolls which had been unlawfully collected and to prescribe their use; in this case, Ordinances 74-19 and 76-19 have been enacted, purportedly to retroactively ratify the unlawful collection of impact fees.
>
> The same constitution which the Supreme Court relied upon to reverse the judgment denying refund to the boat company in *Forbes Pioneer* is still viable and applicable to the issue before this Court. This Court being persuaded that the issues before it are controlled by the principles in *Forbes Pioneer*, supra, it necessarily follows that the enactment of Ordinances 74-19 and 76-19 cannot justify denying to plaintiffs their right to a refund of the impact fees paid under protest." (A-36-37)

Inextricably entwined in consideration of this point is the fact that both the Supreme Court of Florida[9] and the trial Judge[10] found as fact that petitioners were being "doubly assessed" for capital improvements by being required to retire revenue bonds through water rate payments and through an "impact fee" for construction of facilities which would never be used by petitioners.

Under the principal guidelines established by the Supreme Court of Florida prohibiting double assessments and requiring that municipal residents only pay their fair share for capital improvements[11], the respondent still had no authority to enact retroactive legislation. Thus respondent had no *authority* to enact retroactive legislation which had the effect of charging petitioners impact fees for capital improvements they would never use granting to future users a windfall. The Supreme Court of Florida clearly enunciated this principle in its opinion stating:

> "The cost of new facilities should be borne by new users to the extent new users require new facilities, but only to that extent. When new facilities must be built in any event, looking only to new users for necessary capital gives old users a windfall at the expense of new users.

9. "* * The limitation on use of the funds, shown to exist *de facto* in the present case, has the effect of placing the whole burden of supplementary capitalization, including replacement of fully depreciated assets, on a class chose arbitrarily for that purpose." (Opinion at 321)
10. "* * Patently, the funds collected from the impact fees which are now in escrow will not be used for construction or improvement of facilities being used by plaintiff, but will necessarily be applied to other projects. These facts invalidate the requirements set forth in the Supreme Court in upholding a valid impact fee."
11. "The cost of new facilities should be borne by new users to the extent new use requires new facilities, *but only to that extent*. When new facilities must be built in any event, looking only to new users for necessary capital gives old users a windfall at the expense of new users." (Emphasis supplied) (Opinion at 321)



> When certificates of indebtedness are outstanding, new users, like old users, pay rates which include the cost of retiring the certificates, which represent original capitalization. *State v. City of Miami*, supra. New users thus share with old users the cost of original facilities. For purposes of allocating the cost of replacing original facilities, it is arbitrary and irrational to distinguish between old and new users, all of whom bear the expense of the old plant and all of whom will use the new plant.
>
> The limitation on use of the funds, shown to exist *de facto* in the present case, has the effect of placing the whole burden of supplementary capitalization, including replacement of fully depreciated assets, on a class chosen arbitrarily for that purpose." (Opinion at 321)

Thus, even if *Forbes Pioneer*, supra, is construed to permit retroactive legislation where the legislative body had authority to assess fees at the time of the enactment of the invalid ordinance, petitioners should have prevailed. Respondent had no authority under law to "doubly assess" petitioners at the time of its enactment of the invalid ordinance.

Petitioners are well aware of the mortality rate of petitions for certiorari to this Honorable Court; however, the uncontradicted facts here are that the heavy hand and awesome power of government have been utilized to exact substantial monies from petitioners from which petitioners will never derive *any* benefit. This Honorable Court now stands as the last resort before petitioners' constitutional rights will have been flagrantly violated. Under such conditions, petitioners trust that this Court will see fit to grant writ of certiorari and review this matter in detail.

## 2. THE "DOUBLE ASSESSMENT" OF PETITIONERS FOR SEWER AND WATER CAPITAL IMPROVEMENTS VIOLATES PETITIONERS CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION OF THE LAWS.

The Circuit Judge found that petitioners were being in effect taxed or assessed twice for capital improvements:

> "* * Plaintiffs are paying their proportionate share of the bond issue as are the old users of the municipal water and sewer system. Patently, the funds collected from the impact fees which are now in escrow will not be used for construction or improvement of facilities being used by plaintiffs, but will necessarily be applied to other projects. These facts invalidate the requirements set forth by the Supreme Court in upholding a valid impact fee." (A-37)

The District Court, whose order is sought to be reviewed, acknowledged the trial Court's findings but REFUSED TO RULE ON ITS VALIDITY. Further, the trial Court wrote in its Supplemental Judgment that, "Though not necessary, it is appropriate to pass upon one other issue raised by the parties," and made the finding that all of the improvements for which the impact fees in issue were collected are now in existence and are being paid for from the proceeds of the bond issue floated by the City in 1974. This appeal ensues. (Opinion at 848)

This Court has held that unequal taxation is violative of the Equal Protection Clause of the 14th Amendment to the United States Constitution. *Quaker City Cab Co. v. Commonwealth of Pennsylvania*, 277 U.S. 389, 48 Supreme Court 553, 72 L.Ed. 927, *Hillsborough Tp. Summerset County, N.J. v. Cromwell*, 326 U.S. 620, 66 Supreme Court 445, 90 L.Ed. 358.

The Supreme Court of Florida acknowledged this principle in its decision in *Contractors and Builders Association of Pinellas County v. City of Dunedin*, 329 So.2d 314 (Fla. 1976), at 321:

> "* * The limitation on use of the funds, shown to exist *de facto* in the present case, has the effect of placing the whole burden of supplementary capitalization, including replacement of fully depreciated assets, on a class chosen arbitrarily for that purpose."



The case at bar is no different. The District Court had to acknowledge the validity of the findings of fact by the trial Judge sitting as the trier of fact. Only where there was not substantial competent evidence in the record could his findings be ignored. *Bond v. Brown*, 53 U.S. 254, 12 How. 254, 13 L.Ed. 279 (1851); *Guzman v. Pichirilo*, 369 U.S. 698, 82 Supreme Court 1095, 8 L.Ed.2d 205 (1962); *United States v. General Dynamics Corporation*, 415 U.S. 450, 94 Supreme Court 1186, 39 L.Ed.2d 530 (1974). See also *Crain & Crouse, Inc. v. Palm Bay Towers Corporation*, 326 So.2d 182 (Fla. 1976); *The Zack Company v. Cutchins Construction, Inc.*, 344 So.2d 942 (Fla. 3rd D.C.A. 1977); *Exchange Bank of St. Augustine v. The Florida Bank of Jacksonville*, 292 So.2d 361 (Fla. 1974).

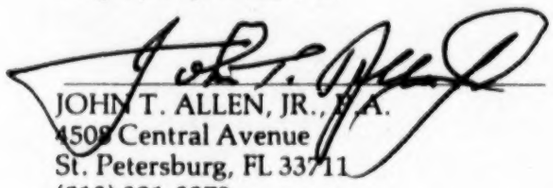
Clearly, the District Court refused to rule upon the equal protection question because reversal could not be accomplished when this point was addressed. This Court has held on many occasions that where an Appellate Court decides a case upon non-federal grounds and refuses to rule upon constitutional issues, this will not inhibit this Court from accepting jurisdiction where the state ground relied on is without any fair or substantial support. *Staub v. City of Baxley*, 355 U.S. 313, 78 Supreme Court 277 (1957); *National Association for the Advancement of Colored People v. State of Alabama*, 357 U.S. 449, 78 Supreme Court 1163, 2 L.Ed.2d 1488 (1964.)

In short, the District Court's order is erroneous since it acknowledges unequal assessment of petitioners who have been placed in an arbitrary class. The District Court attempted to ignore this vital issue and ruled upon other grounds. This failure does not constitute a bar to this Court's deciding this question at this juncture. Accordingly, petitioners have demonstrated to this Court fundamental constitutional error which must be redressed by granting certiorari.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the District Court of Appeal of the State of Florida, Second District.

Respectfully submitted,



JOHN T. ALLEN, JR., P.A.
4508 Central Avenue
St. Petersburg, FL 33711
(813) 321-3273
*Attorney for Petitioners*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of July, 1979, two copies of the foregoing Petition for a Writ of Certiorari to the District Court of Appeals of the State of Florida, Second District, have been furnished by mail to C. ALLEN WATTS, ESQUIRE, P.O. Box 3130, Deland, Florida 32720, Attorney for Respondent; and JOHN G. HUBBARD, ESQUIRE, 1960 Bay Shore Boulevard, Dunedin, Florida 33528, Attorney for Respondent.

Attorney

# APPENDIX

**IN THE**

**CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA**

---

**CIRCUIT CIVIL NO. 73-827**

---

CONTRACTORS AND BUILDERS ASSOCIATION OF PINELLAS COUNTY, a Florida corporation, HALLMARK DEVELOPMENT COMPANY, INC., a foreign corporation licensed to do business in the State of Florida, KENNETH A. MARRIOTT, VERNON M. MILLER and GEORGE C. WAGNER,
*Plaintiffs,*
*vs.*
THE CITY OF DUNEDIN, FLORIDA,
a municipal corporation,
*Defendant.*

---

**COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**

Plaintiffs, CONTRACTORS AND BUILDERS ASSOCIATION OF PINELLAS COUNTY, a Florida corporation, HALLMARK DEVELOPMENT COMPANY, INC., a foreign corporation licensed to do business in the State of Florida, KENNETH A. MARRIOTT, VERNON M. MILLER and GEORGE C. WAGNER, by and through their undersigned attorneys, sue defendant, THE CITY OF DUNEDIN, FLORIDA, a municipal corporation, and aver:

**COUNT I**

1. This is an action seeking to declare a municipal ordinance void, invalid and unconstitutional by seeking an injunction prohibiting the defendant from further enforcement of the ordinance in an action formerly cognizable in equity.

2. At all times material to this complaint, the Contractors and Builders Association of Pinellas County is a Florida corporation organized and existing under the laws of the State of

Florida with its principal place of business being in Pinellas County, Florida. The purpose of the existence of the Contractors and Builders Association of Pinellas County, hereinafter referred to as "Contractors and Builders Association," is to represent its members who are engaged as contractors and builders in Pinellas County and their association with local City and State government on matters which directly affect the Association's members.

3. At all times material to this complaint, Hallmark Development Company, Inc., is a Wisconsin corporation licensed to do business in the State of Florida and is the owner of Lots "D" and "B" of Heather Lake Subdivision located at the northeast corner of Virginia and Patricia Avenues in Dunedin, Florida.

4. At all times material to this complaint, Kenneth A. Marriott is a duly licensed contractor, builder and developer who is the owner of a lot at 1012 Suemar Road in the City of Dunedin, Florida.

5. At all times material to this complaint, Vernon M. Miller is a duly licensed contractor, builder and developer who is the owner of Lots 332 through 334 Acropolis Drive in the City of Dunedin, Florida.

6. At all times material to this complaint, George C. Wagner is a duly licensed contractor, builder and developer who is the owner of Lots 14 and 16, Block C, Lakeside Terrace, First Addition, and Lot 14, Dunedin Lakewood Estates, First Addition, located in the City of Dunedin, Florida.

7. At all times material to this complaint, the City of Dunedin, Florida, is a municipal corporation organized and existing under the Special Laws of the State of Florida and which is located in Pinellas County, Florida.

8. On May 1, 1972, the defendant City of Dunedin adopted an amendment to its ordinance Sec. 25 of the Dunedin City Code to become effective May 10, 1972. The pertinent and material provisions of this amendment state as follows:



"Sec. 25-14. *Sewage connection required; notice.*

"The owner of any house, building, or property used for human occupancy, employment, recreation, or other purpose, situated within the city and abutting on any street, alley or right-of-way in which there is now located or may in the future be located a public sanitary or combined sewer of the city, is hereby required at his expense to install suitable toilet facilities therein, and to connect such facilities directly with the proper public sewer in accordance with the provisions of this chapter, within ninety (90) days after date of official notice to do so, provided that said public sewer is within two hundred (200) feet of the house, building, or properties used for human occupancy.

"At the time of connection to the proper public sewer, if a septic tank has been abandoned, the owner is hereby required, at his expense, to have said septic tank pumped dry, filled to the rim with suitable fill material or excavated and disposed of and properly backfilled. * *"

"Sec. 25-31. *Same—Classes of permits; contents; inspection fees.*

"There shall be two classes of building sewer permits: (1) for residential and commercial service; and (2) for service to establishments producing industrial waste. In either case, the owner or his agent shall make application on a special form furnished by the city. The permit application shall be supplemented by any plans, specifications, or other information considered pertinent in the judgment of the city sewer superintendent. *No permit will be issued unless the assessment as set forth in section 25-71(c) and (d) has been paid.* * *" (Emphasis supplied)

"Sec. 25-32. *Same—Costs paid by owner.*

"All costs and expense incident to the installation, connection and maintenance of the building and collector sewers shall be borne by the owners. The owners shall indemnify the city from any loss or damage that may directly or indirectly be occasioned by the installation of the building sewer. * *"

"Sec. 25-71. *Meters—Connection or installation charge.*

"(a) The connection charge for the installation of a meter inside the city shall be as follows:

| | | |
|---|---|---|
| 5/8" | meter | $ 95.00 |
| 1" | meter | 170.00 |
| 1-½" | meter | 265.00 |
| 2" | meter | 360.00 |

"(b) The connection charge for the installation of a meter outside the city limits shall be as follows:

| | | |
|---|---|---|
| 5/8" | meter | $105.00 |
| 1" | meter | 180.00 |
| 1-½" | meter | 290.00 |
| 2" | meter | 390.00 |

"(c) In addition to the meter installation charges described herein, there shall be paid an assessment to defray the cost of production, distribution, transmission and treatment facilities for water and sewer provided at the expense of the City of Dunedin, as follows:

| | |
|---|---|
| Each dwelling unit; for water | $325.00 |
| for sewer | 475.00 |
| Each transient unit; for water | 150.00 |
| for sewer | 275.00 |
| Each business unit; for water | 325.00 |
| for sewer | 475.00 |

"(d) The assessments as set forth herein shall be payable upon issuance of the building permit for said unit or units in the case of new construction, or in the case of a presently existing structure or structures, such assessments shall be payable when the permits for water or sewer connections are issued. * *"

9. The above amendments to Section 25 of the Dunedin City Code, and in particular Section 25-71, hereinafter referred to as "the ordinance", imposed a special assessment against all property owners in the City of Dunedin who wish to obtain water and sewage connections "to defray the cost of production, distribution, transmission and treatment facilities for water and sewer provided at the expense of the City of Dunedin * *."



10. According to the ordinance, one unit for water and sewer imposes an $800 special assessment in addition to connection charges as more particularly prescribed in Section 25-71 of the ordinance. The assessments are required to be paid upon issuance of a building permit in the case of new construction or upon issuance of permits for water and sewage connections in cases of pre-existing structures.

11. The practical effect of the ordinance requires all residents to connect to sewage and water facilities. No permits will be issued for sewer and water unless each property owner pays a special assessment according to the number of water and sewer units placed on the property. As an example, an apartment building comprising twenty apartments at a unit cost of $800 for one water and sewage connection would be assessed the sum of $16,000.

12. The intent of the ordinance is to provide revenue for additional public improvement facilities to be constructed in the future for water and sewage. The $800 assessment was arrived at strictly on the basis of a general estimate of costs for water and sewage improvements in the sum of $8,000,000. The Dunedin City Council, prior to passage of the ordinance, concluded that they would have approximately 1,000 applications per year for water and sewer connections, and therefore, the funds raised by the ordinance would be funded toward the cost of new water and sewer facilities.

13. The funds, or at least some of them, collected by the defendant since the passage of the ordinance, have not been placed in any reserve fund, but have been commingled with and used as general funds to defray general expenses of the City of Dunedin.

14. The plaintiff, Contractors and Builders, is directly and peculiarly affected by the ordinance sought to be reviewed in that it represents the entire class of contractors and builders in the Dunedin city area, which said contractors and builders must directly and individually bear the cost of the special

assessment and tap-in fee levied by the ordinance so that its property rights and property rights of its members are directly affected thereby.

15. Plaintiffs, Hallmark Development Company, Inc., Kenneth A. Marriott, Vernon M. Miller, and George C. Wagner, have been directly and peculiarly affected by the ordinance in that they have paid under protest or have refused to pay upon demand the special assessment or tap-in fee levied by the ordinance upon commencement and/or completion of a new building project upon the properties as hereinabove alleged as levied or attempted to be levied by the City of Dunedin, Florida.

THE ORDINANCE WAS ENACTED WITHOUT LEGISLATIVE AUTHORITY.

16. Pursuant to the mandates of Florida law, a special assessment such as the ordinance must be enacted by a municipality pursuant to legislative authority. Such authority is either gained through a city's charter such as a special act promulgated by the Legislature of the State of Florida or through the Florida Constitution and the general laws of Florida, generally granting to municipalities the right to enact special assessment ordinances.

17. The Charter of the City of Dunedin being derived from Chapter 4877, Special Acts of Florida 1899 as amended by Chapter 15183, Special Acts 1931, as expanded by Chapter 29030, Special Acts 1953 and further expanded by Chapter 26160, Special Acts 1949, provided in Section 70, "Public improvements", at the time of the passage of the ordinance as to special assessments as follows:

> "The City Commission shall have the power to open, establish, alter, extend, widen, grade, regrade, pave, repave or otherwise improve or repair streets, avenues, alleys, sidewalks and other public ways and thoroughfares, and the establishment and maintenance of parkways, curbing, etc., in front of said property, and the construction and maintenance of sea walls, storm and sanitary sewers, and the construction and maintenance of water mains, gas mains and other sewers or drains, and may, in the payment of such improvements, pay for same by direct taxation or



> by special assessment against the property benefited by such improvements. *In the event that any of such improvements be made and it be intended to assess the cost or any part thereof against the benefited property, then the procedure to be followed in the making of such assessments, and in the issuance of bonds to pay for the same, shall be in the manner and in the way as is provided by the laws of the State of Florida applicable to the making of public improvements by municipalities and the assessment of the cost thereof, as the said law is now or as may be hereinafter provided; and all of such assessments and the liens thereof shall be of the dignity and shall be enforced in the manner as provided by law."* (Emphasis supplied)

18. Therefore, pursuant to Section 70, Public improvements, of the existing Charter of the City of Dunedin, Florida, an ordinance must follow the prescribed dictates of general statutes permitting special assessments existing in the State of Florida at the time of passage of the ordinance.

19. Section 167.436, F.S.A. 1971, entitled "Special assessments; assessment and collection" of Chapter 167, Florida Statutes, which provides for the general powers and authorities of municipalities, provides that the procedure for special assessments shall follow municipal charters or special acts relating to special assessments, to-wit:

> "167.436 *Special assessments; assessment and collection.*
>
> Special assessment liens shall continue to be assessed and collected as provided for under applicable municipal charters or special acts relating to special assessments which now exist or which may become law."

20. Accordingly, no power may be derived for special assessment by the City of Dunedin pursuant to Chapter 167 F.S.A. 1971, as general law does not provide appropriate procedure for enactment of special assessments but merely refers to and permits procedures for assessment as outlined by city charter. There are no special acts relating to special assessments other than those alleged herein which apply to the City of Dunedin, Florida.

21. Chapter 170, F.S.A. 1971, provides for supplemental and authoritative methods of making local municipal improvements. Said Chapter provides specific legal machinery for assessments including the method of prorating special assessments, resolution invoking the procedure of the Chapter, and requirements for plans and specifications with estimated cost of proposed improvements required before adoption of resolution. The ordinance of the City of Dunedin, Florida, does not purport by enabling act to invoke the procedures of Chapter 170, F.S.A. 1971, and accordingly, said ordinance, on its face, shows that it was not promulgated pursuant to said Chapter.

22. Chapter 180, F.S.A. 1971, which provides for special assessments and construction of municipal public works, and Chapter 184, F.S.A. 1971, which permits sanitary sewer finances, similarly provided for the enactment by ordinance of a prescribed procedure whereby all citizens of a municipality are equally taxed for general assessments on a prescribed and equal basis. The ordinance of the City of Dunedin, Florida, fails to invoke by appropriate resolution the provisions of either Chapter 180 or 184, F.S.A. 1971.

23. Accordingly, the ordinance of the City of Dunedin was enacted without legislative authority and is void as a matter of law.

THE ORDINANCE IS INVALID AS A SPECIAL ASSESSMENT.

24. The ordinance, in providing for a special assessment to defray the cost of production, distribution, transmission and treatment of water and sewer facilities, is indefinite as to whether or not the assessment is being levied for existing or future planned water and sewer plants, and accordingly is invalid under law because of such indefiniteness.

25. If the intent of the ordinance is to defray the cost of existing water and sewer plants, said assessment is invalid as requiring a particular class of citizens of Dunedin to bear an unequal burden of such facilities for the benefit of all citizens of the municipality of Dunedin.

26. If the intent of the ordinance is for assessment for future building of additional water and sewer plants, said assessment is invalid as requiring a particular class of citizens to pay for water and sewer facilities which will be enjoyed by all citizens of the City of Dunedin.



27. In either event (assessment for planned or future facilities) said assessment constitutes general taxation for facilities enjoyed by the entire community or the municipality and not peculiarly those who are assessed by the ordinance so that the ordinance does not specially and peculiarly benefit the property assessed to the exclusion of other properties and on its face does not benefit or improve the value of the assessed properties equal to the value of the assessment. In fact, the special assessment does not increase the value of any of the properties assessed. Accordingly, such assessment is not in reality or by legal construction a valid special assessment but constitutes a general assessment or taxation of a particular class or group and is invalid under the laws of the State of Florida.

28. The special assessment, by its exorbitant amount which is unequaled or unparalleled as a tap-in fee by any municipality in the State of Florida, has the effect of increasing building costs to such an exorbitant extent where large projects are concerned as to be prohibitive in large building projects, and in some cases the assessment exceeds the cost of the land purchased to be developed. As such, the practical effect of the ordinance is to require a moratorium on building projects of moderate or great magnitude in the City of Dunedin, and further on its face and in practical application is palpably arbitrary, grossly unequal and unreasonable, confiscatory and devoid of any sound or rational basis.

29. The ordinance fails to provide for a method of apportionment at any one singular time such as at the commencement of a project, which said apportionment would be applied to all individuals or a recognized class of individuals to be assessed. The method of apportionment of an estimated eight million dollar water and sewage construction bill which in turn was calculated by an estimate of one thousand applicants per year, thus requiring an eight hundred dollar assessment per unit for water and sewer facilities is and has been calculated on a unit basis which has been uniformly held to be illegal and an inadequate method of apportionment of special assessments under the laws of the State of Florida.

30. The ordinance on its face shows that the special assessment and ordinance do not establish definite costs prior to assessment and, as enacted, the ordinance permits special assessment at a fixed rate in perpetuity; as such, said special assessment is invalid under the laws of the State of Florida.

31. As hereinabove alleged, special assessment funds have been commingled, at least to some extent, with the general funds of the City of Dunedin. Special assessment funds can only be levied to pay for an improvement local in character, as distinguished from general in character, and the proceeds of such assessments cannot, under law, be used to augment the general revenue fund of any municipality. By commingling of such said funds, the defendant has rendered the ordinance invalid in application and thus voidable at the insistence of the plaintiffs.

32. The ordinance fails to specify or state that the assessments are not in excess of the benefits derived by the property holders assessed and is accordingly illegal and void under the laws of the State of Florida.

THE ORDINANCE IS UNCONSTITUTIONAL ON ITS FACE AND IN APPLICATION.

33. The ordinance, as hereinabove factually alleged, imposes an assessment which exceeds the benefits conferred on the property assessed, constitutes general taxation of a particular group for the benefit of a larger group, or in this case the entire citizenry of the City of Dunedin. The ordinance further fails to give property owners who would be assessed notice of the assessment and an opportunity to be heard prior to the imposition of the final assessment. Accordingly, the ordinance is invalid and unconstitutional as violating the due process clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 9 of the Constitution of the State of Florida as revised 1971.

34. The assessment, as hereinabove factually alleged, and as revealed by the plain reading of the ordinance, is taxation of a particular class for special tax purposes in an area exclusively recognized by law as general taxation, is in application palpably arbitrary and unreasonable, grossly unequal and confiscatory and devoid of any rational basis so as to essentially constitute an arbitrary abuse of power and, therefore, void as unconstitutional in violating the equal protection clause of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 1, of the Constitution of the State of Florida, as revised 1971.



35. Plaintiffs will suffer irreparable injury and harm if the ordinance remains in effect and is not declared illegal, void and unconstitutional. Plaintiffs have no adequate remedy in cases formerly cognizable at law.

WHEREFORE, plaintiffs pray as follows:

A. That upon final hearing in this cause, the defendant, City of Dunedin, be permanently enjoined from the enforcement of the ordinance.

B. For judgment in the amount of the assessment paid to defendant by plaintiffs with interest and issue a mandatory injunction requiring defendant to return all funds and proceeds collected or received by assessment of the citizens of Dunedin.

C. That this Court find that the defendant, City of Dunedin, is without legislative authority to enact the ordinance, and accordingly the ordinance is void; that the ordinance constitutes an improper and illegal special assessment upon the grounds alleged in this complaint; that the ordinance is unconstitutional as violative of the Federal and Florida Constitutions as more particularly alleged herein.

D. For such other and further relief as this Court may find the plaintiffs to be entitled.

E. For costs of this action.

**COUNT II**

36. Plaintiffs reallege and reaver their allegations in Paragraphs 1 through 34 above.

37. There exists a justiciable controversy between plaintiffs and defendant as to the validity, legality, and constitutionality of the ordinance and whether or not plaintiffs, or some of them, must pay the special assessment under the ordinance, and

accordingly, plaintiffs are in doubt as to the existence or non-existence of their rights and privileges under the ordinance and their rights to normal construction and development of property lying within the corporate limits of the City of Dunedin.

WHEREFORE, plaintiffs pray as follows:

A. That this Court enter a declaratory judgment or decree determining the rights and privileges of the plaintiffs under the ordinance, declaring the ordinance to be enacted without proper legislative authority, to be illegal and unconstitutional as alleged herein.

B. For judgment in the amount of the assessment paid to defendant by plaintiffs with interest and issue an order requiring defendant to return all funds and proceeds collected or received by assessment of the citizens of Dunedin.

C. For such other and further relief as this Court may find plaintiffs to be entitled.

D. For costs of this action.

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*Attorneys for Plaintiffs*
and

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HOWARD W. DUKE
1345 South Missouri Avenue
Clearwater, Florida



**IN THE**
**CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA**

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**CIRCUIT CIVIL NO. 73-827**

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CONTRACTORS AND BUILDERS ASSOCIATION OF PINELLAS COUNTY, a Florida corporation, HALLMARK DEVELOPMENT COMPANY, INC., a foreign corporation licensed to do business in the State of Florida, KENNETH A. MARRIOTT, VERNON M. MILLER, and GEORGE C. WAGNER,
*Plaintiffs,*
*vs.*
THE CITY OF DUNEDIN, FLORIDA,
a municipal corporation,
*Defendant.*

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## FINAL JUDGMENT

The City of Dunedin is enjoying, or suffering, depending upon one's viewpoint, growth problems. The demand for sewer and water connections has strained the capabilities of the sewer and water department departments to near the breaking point. Attempting to cope with the demand for sewer and water connections the City adopted Ordinance 72-26, which as amended assessed against new connections a total "impact fee" of approximately $700.00 for dwelling or commercial units.

Plaintiffs, CONTRACTORS AND BUILDERS ASSOCIATION OF PINELLAS COUNTY, HALLMARK DEVELOPMENT COMPANY, INC., KENNETH A. MARRIOTT, VERNON M. MILLER, and GEORGE C. WAGNER, seek declaratory and injunctive relief in this action against the imposition of the "impact fee".

## FACTUAL FINDINGS

The cause having been tried to the Court sitting without jury, the parties having submitted evidence, stipulations, and other proofs, the Court finds the ultimate facts to be: that the

City on May 1, 1972, adopted Ordinance 72-26; that on June 19, 1972, Ordinance 72-26 was amended by Ordinance 72-42; that as amended, Ordinance 72-26 imposes an "assessment" of $375.00 to connect to the sewer system of Dunedin, and an "assessment" of $325.00 for water connections; that the "assessment" is against each individual dwelling unit and business unit; that the aggregate cost to a dwelling or business unit to connect with the Dunedin sewer and water system is $700.00; that a fee of $700.00 for connections is substantially in excess of the cost of connecting to the systems; that payment of the fee is a condition precedent to the water or sewer connection, is payable but once and does not constitute a charge against real property; that the proceeds derived from the $700.00 connecting fees are earmarked by the City for capital improvements to the system as a whole; the Court further finds that plaintiffs have standing to bring this action and that each plaintiff is adversely affected; finally, that payment of the "impact fee" is limited to new connections to the water and sewer system and is not payable to any degree by the existing users of the sewer and water system. The salutory purpose of Ordinance 72-26 strikes a sympathetic chord with the Court. Implicit in the ordinance is the philosophy that those who are creating the inordinate demand for services ought to bear the prime cost of the same. This approach is laudable, but unfortunately it has resulted in a solution not authorized by the Charter of the City of Dunedin, nor by General Statute.

This is so for the reason that the power to tax can never be inferred or implied but must be expressly conferred to a municipality. Statutes purporting to grant a power of taxation are strictly construed against the town or city purporting to act under them.

The City claims as authority to impose the "impact fee" the following provisions of its Charter and general legislative acts:

CHARTER, Article XII Section 70
Article II Section 7 (23)
FLA. STAT. Secs. 167.01, 167.73,
168.14 and 180.13

And all other applicable provisions of Charter or general law.



Section 70 of the Charter, supra, is a grant of authority to the City to provide, construct, and maintain public improvements, including sewer and water systems, and further provides for the method of paying for such improvements. The method of payment provided for in Section 70 is by "direct taxation or by special assessment against the property benefitted by such improvements".

It needs no discussion to point out that the "impact fee" under attack is not "direct taxation" and could not be sustained as such.

Can the "impact fee" be sustained as a "special assessment against the property benefitted by such improvements"? Again, the answer must be no. In the first place, the "impact fee" is not a "special assessment against property benefitted by such improvements", but even more important, Section 70 directs that in case of special assessment, it shall be done in accordance with the general law for paying for public improvements and declining to catalog these requirements it is sufficient to say that there has been no compliance with the requirements of the general law.

Article II, Section 7 (23), supra, does nothing but grant the City implied powers in carrying out specific grants of power or authority. Power to tax cannot be implied, nor inferred, but must be clearly and unequivocally conferred by Charter or Statute. The "impact fee" is sometimes designated a "capital contribution charge", "assessment", "connection charge", or "impact fee". By whatever name, it is money taken by the municipality from the citizens and property owners for a public purpose and as such, under the law, can only be considered an exercise of the power of taxation.

If the City is without express power to levy the tax, then it cannot be upheld under "implied power".

In summary, as to the authority of the City under its Charter, the Court finds that the fee sought to be levied under Ordinances 72-26 and 72-42 is not "general taxation" nor is it "a special assessment against the lands to be benefitted". The fee, therefore, cannot be sustained under the Charter.

The Court has endeavored to indulge a presumption of correctness and validity which surrounds a properly enacted ordinance. To this end Sections 167.01 and 167.73 of the Florida Statutes have been scrutinized closely as a possible support for the tax. Counsel for defendant City provided the Court with vigorous and ingenious arguments urging these statutes as a salvation for the "impact fee".

These sections of the statutes constitute general grants of power to Florida municipalities to make improvements and authorize "reasonable charges" for the furnishing of services and facilities by municipalities. Unfortunately, the fee under attack is not a "reasonable charge" as contemplated by the aforesaid statutes, but in effect is an effort to provide assessments for construction of a system in a manner prohibited by law. CITY OF HALLANDALE vs. MEEKINS, (Fla. 4th DCA) 273 So.2nd 318; STEWART vs. CITY OF DELAND, 75 So.2nd 584; and STATE vs. CITY OF ST. PETERSBURG, 61 So.2nd 416.

Plaintiffs have posed certain constitution issues; however, having determined that the City is without Charter or statutory authority to levy the fee under Ordinances 72-26 and 72-42, it is not necessary to consider the constitutional issues. It is fundamental that a Court should not resolve a matter through constitutional consideration except when absolutely necessary.

> "It is the purpose of this law to better enable the several counties and municipalities of this state to provide public services and construct public facilities to accommodate the orderly growth and development within their jurisdictions. To this end it is the intent of the Florida legislature that the costs of these services be more fairly borne by the owners of new construction and development which make these additional costs necessary rather than placing a burden of these costs on owners of existing construction. It is the further purpose of this law to eliminate the need for development and construction moratoriums by insuring that counties and municipalities can provide services and facilities necessary to accommodate orderly growth."

The language quoted above is from a legislative Act presently pending before the State legislature. This Act, if passed, will be known as the "Florida Impact Fee Law".



It is to the ultimate passage of this Act that the defendant City must look for authority to collect the fees provided for under Ordinances 72-26 and 72-42, absent, of course, an amendment to the City Charter.

The existence of the proposed legislation was brought to the Court by defendant's counsel and notwithstanding that in doing so counsel urged that its purpose was to provide for a "uniform method" of "impact fee" assessments, it is persuasive of an acknowledgement that there is no present authority for the imposition of an "impact fee"; wherefore, it is

ORDERED, ADJUDGED AND DECLARED:

a. That the City of Dunedin was without authority to enact those provisions of Ordinances 72-26 and 72-42 which levied the $375.00 and $325.00 fees respectively for connecting to the water and sewer lines.

b. That the City of Dunedin is enjoined and restrained from enforcing collection of the fees as now provided for under Ordinances 72-26 and 72-42, PROVIDED that the City may by appropriate ordinance charge and collect a "reasonable fee" for connecting to its municipal water and sewer systems, all within the purview and under the authority of Chapters 167.01 and 167.73, Florida Statutes.

c. That the City refund to the individual plaintiffs to this cause or to any member of plaintiff, CONTRACTOR AND BUILDERS ASSOCIATION OF PINELLAS COUNTY, any fees paid and collected under Ordinances 72-26 and 72-42 if said fees were paid by the payor under protest. It is the explicit intent of the Court that to make the effect of this Judgment retroactive in toto is impractical and the ends of justice do not require subjecting the defendant City to the expense and difficulties of accounting for all fees heretofore collected.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs have their costs from defendant and same shall be taxed upon appropriate Motion therefor.

IT IS SO ORDERED AND ADJUDGED in Chambers in Clearwater, Florida, this 26th day of March, 1974.

B. J. DRIVER
Circuit Judge



**CITY OF DUNEDIN, Florida, Appellant,**

**v.**

**CONTRACTORS AND BUILDERS ASSOCIATION OF PINELLAS COUNTY, a Florida Corporation, et al., Appellees.**

**CONTRACTORS & BUILDERS ASSOCIATION OF PINELLAS COUNTY, a Florida Corporation, et al., Appellants,**

**v.**

**CITY OF DUNEDIN, Florida, Appellee.**

**Nos. 74-401, 74-1017.**

District Court of Appeal of Florida, Second District.

April 30, 1975.

Rehearing Denied June 10, 1975.

Action was brought challenging authority of municipality to charge a so-called "impact fee" for privilege of connecting to its water and sewer systems. The Circuit Court, Pinellas County, B. J. Driver, J., entered judgment enjoining collection and city appealed. The District Court of Appeal, Grimes, J., held that where there had been dramatic growth within area logically served by city sewer and water systems, expansion of them was imminent, average amounts necessary to finance expansion were $357 for each water connection and $631 for each sewer connection and proceeds derived from connecting fees were earmarked by city for capital improvements to systems as a whole, city had authority to charge "impact fees" of $325 for water connection and $375 for sewer connection, and that the ordinances which imposed fees payable by every person who thereafter connected were not unconstitutional on theory that they discriminated against newcomers.

Reversed.

**1. Municipal Corporations ⇐956(1)**

Municipality cannot impose a tax, other than ad valorem tax, unless authorized by general law. West's F.S.A.Const. art. 7, § § 1, 9.

**2. Municipal Corporations ⇐619**

Fees imposed for connecting to municipal utility system do not constitute "taxes" but are charges for using utilities services.

See publication Words and Phrases for other judicial constructions and definitions.

**3. Municipal Corporations ⇐712**

**Waters and Water Courses ⇐203(5)**

Where growth patterns are such that existing water or sewer system must be expanded in near future, municipality may change connection fee in excess of physical cost of connection if it does not exceed proportionate part of amount reasonably necessary to finance expansion and is earmarked for that purpose. West's F.S.A. Const. art. 7 § § 1, 9.

**4. Municipal Corporations ⇐712**

**Waters and Water Courses ⇐203(5)**

Where there had been dramatic growth within area logically served by City sewer and water systems, expansion of them was imminent, average amounts necessary to finance expansion were $357 for each water connection and $631 for each sewer connection and fees charged were earmarked by city for capital improvements to systems as a whole, city had authority to charge so-called "impact fee" of $325 for each water connection and $375 for each sewer connection. West's F.S.A. § 180.13.

**5. Municipal Corporations ⇐712**

**Waters and Water Courses ⇐203(3)**

Ordinances imposing fees payable thereafter on every connection into city's water or sewer system were not unconstitutional on theory that they discriminated against newcomers because they applied to every propery owner who thereafter connected into the system even if he had lived in the city all his life and his property was in the heart of the city.

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C. Allen Watts of Fogle & Watts, DeLand, for appellant/appellee City of Dunedin.

John T. Allen, Jr., St. Petersburg, for appellees/appellants Contractors and Builders Assn., et al.

Ralph A. Marsicano, Tampa, and Burton M. Michaels, Tallahassee, for amicus curiae, Florida League of Cities, Inc.

GRIMES, Judge.

This case involves the authority of a municipality to charge a so-called "impact fee" for the privilege of connecting to its water and sewer systems.

The City of Dunedin (city) passed certain ordinances which imposed a fee of $325 for each water connection and $375 for each sewer connection "to defray the cost of production, distribution, transmission and treatment facilities for water and sewer provided at the expense of the City of Dunedin." These fees were in addition to charges imposed for the cost of physically connecting into the systems. Certain local contractors, together with the Contractors and Builders Association of Pinellas County, filed suit seeking declaratory and injunctive relief against the imposition of these fees. The final judgment stated in part:

> "The City of Dunedin is enjoying, or suffering, depending upon one's viewpoint, growth problems. The demand for sewer and water connections has strained the capabilities of the sewer and water departments to near the breaking point. Attempting to cope with the demand for sewer and water connections, the City adopted Ordinance 72-26, which as amended assessed against new connections a total 'impact fee' of approximately $700.00 for dwelling or commercial units.
>
> ". . . The salutory purpose of Ordinance 72-26 strikes a sympathetic chord with the Court. Implicit in the ordinance is the philosophy that those who are creating the inordinate demand for services ought to bear the prime cost of the same. . . ."

However, the court concluded that the city was without authority to impose the fees and entered a judgment enjoining their collection.

There are three reported Florida decisions dealing with a form of impact fee. The cases of Venditti-Siravo, Inc. v. City of Hollywood, 1973, 39 Fla.Supp. 121, and Janis Development Corp. v. City of Sunrise, 1973, 40 Fla.Supp. 41, dealt with ordinances which imposed a surcharge on building permits. The funds derived by the surcharge in *Venditti* were to be used for acquiring and developing parks, and the funds collected in *Janis* were to be used for roads. Hence, there was only a nebulous relationship between the subject upon which the charge was being imposed and the facilities for which the money was going to be spent. In each case the court



properly characterized the fee as a tax which was beyond the city's authority to impose. In Pizza Palace of Miami, Inc. v. City of Hialeah, Fla.App.3d, 1970, 242 So. 2d 203, our sister court held that a sewer connection fee could not be charged against a lessee because the ordinances of the city provided that the owner had the responsibility for connecting to the sewer lines. The court pointed out that it was unnecessary to its decision to pass upon the validity of the sewer connection charge itself. Thus, it is evident that the case *sub judice* is a case of first impression in Florida.

The imposition of fees such as those in this case have been upheld in several other jurisdictions.[1] In Brandel v. Civil City of Lawrenceburg, 1967, 249 Ind. 47, 230 N.E. 2d 778, the court sustained an ordinance setting a $200 fee for those who connected to a new section of the sewage system and a $62.50 fee for those who connected to the old sewage system. The court noted that the fee was in the nature of a "use tax" for the "services" of disposing of sewage from particular property. The court rejected a charge of discrimination, pointing out that the original cost of the old system was less than that of the new system and, therefore, it was logical that the charges for its use would be less than those for the use of the new system.

In Hartman v. Aurora Sanitary District, 1961, 23 Ill.2d 109, 177 N.E.2d 214, the District established a capital improvement fund for the purpose of building new sewage facilities to be financed by a $160 connection fee charged for connections in recently annexed territories. The connection fee for the original territory of the District was $15. In upholding the $160 fee, the court said:

> ". . . It is patent that the rapid expansion of our municipalities has rendered inadequate prior facilities developed for the health and welfare of the community. It is only proper that all citizens of the community should share equally in the cost of maintaining a sanitary plant which benefits the health and welfare of the entire community by the proper disposal of sewage. It would seem equally fair that those property owners who benefit especially, not from the maintenance of the system, but by the extension of the system into an entirely new area, should bear the cost of that extension. . . ."

A city ordinance raising the sewer connection charge for single family dwellings from $25 to $255 was attacked in Hayes v. City of Albany, 1971, 7 Or.App. 388, 490 P.2d 1018. The money was earmarked for the construction and expansion of the city's sanitary sewer system. The plaintiff contended the ordinance was invalid as being a tax and further argued that even though it be considered a "user charge" it was void because it was not "just and equitable." In upholding the ordinance, the Oregon court distinguished several adverse decisions on the basis that in those cases the funds collected could be used for general public purposes, whereas the proceeds from the sewer connection charge were limited to the development and maintenance of the sewage disposal system. The court concluded that the city had the power to make a charge reasonably commensurate with the burden currently imposed or reasonably anticipated upon the system.

1. For decisions to the contrary, *see, e. g.*, Lloyd E. Clarke, Inc. v. City of Bettendorf, 1968, 261 Iowa 1217, 158 N.W.2d 125; Norwick v. City of Winfield, 1967, 81 Ill.App.2d 197, 225 N.E.2d 30.

One of the most recent cases on the subject is Home Builders Association of Greater Salt Lake v. Provo City, 1972, 28 Utah 402, 503 P.2d 451, in which the City of Provo enacted an ordinance imposing a sewer connection fee for each living unit in newly constructed buildings. The purpose of the fee, which admittedly exceeded the cost of inspection and connection, was to provide the requisite funds to improve and enlarge the sewer system. In sustaining the ordinance, the court held that the fee was neither a tax nor an assessment but a payment for services furnished.

[1] While many parts of this country are experiencing growth due to the population explosion, at the present time no state is more imminently faced with the problems inherent in population increase than Florida. Where a city's water and sewer facilities would be adequate to serve its present inhabitants were it not for drastic growth, it seems unfair to make the existing inhabitants pay for new systems when they have already been paying for the old ones. The question posed here is whether the city could legally finance the expansion through increased connection charges. The court below concluded that the connection charge was, in reality, a tax. If this is so, it cannot be sustained because a municipality cannot impose a tax, other than ad valorem taxes, unless authorized by general law.[2]

[2, 3] In construing Fla.Stat. § 180.13 (1971) our Supreme Court in Cooksey v. Utilities Commission, Fla.1972, 261 So.2d 129, said:

> "Implicit in the power to provide municipal services is the power to construct, maintain and operate the necessary facilities. The fixing of fair and reasonable rates for utilities services provided is as incident of the authority given by the Constitution and statutes to provide and maintain those services. . . ."

The imposition of fees for the use of a municipal utility system is not an exercise of the taxing power nor is it the levy of a special assessment. State v. City of Miami, 1946, 157 Fla. 726, 27 So.2d 118. In our view, connection fees such as those involved in this case do not constitute a tax[3] but a charge which may be made for the use of the utility service pursuant to the authority of its charter and Fla.Stat. § 180.13 (1971),[4] providing they meet the criteria hereafter set forth. We hold that where the growth patterns are such that an existing water or sewer system will have to be expanded in the near future, a municipality may properly charge for the privilege of connecting to the system a fee which is in excess of the physical cost of connection, if this fee does not exceed a proportionate part of the amount reasonably necessary to finance the expansion and is earmarked for that purpose. Having

2. Fla.Const. Art. VII, §§ 1, 9 (1968); City of Tampa v. Birdsong Motors, Inc., Fla.1972, 261 So.2d 1.

3. We cannot accept appellees' argument that since a property owner within the municipal limits is required to use the city's sewer facilities, the sewer connection ordinance has the effect of imposing a tax. It is only when building is commenced upon his property and the need for sanitary facilities arises that a landowner must pay the fee. Just because he is prohibited from using a septic tank doesn't mean he is being taxed. *See* Brandel v. Civil City of Lawrenceburg, *supra*.

4. No one doubts that a municipality has the power to make reasonable charges for water and sewer services. The question is whether the cost of projected capital improvements can be considered in setting the charges.



announced the rule, we must now determine its applicability to the instant case.

[4] The evidence clearly demonstrates dramatic growth within the area logically served by the city systems. The evidence also supports the fact that the sewer and water systems were running near capacity and the expansion of these systems was imminent. The only expert witness at the trial testified that the average charge per connection necessary to finance the expansion within the area to be reasonably served was $357 for water and $631 for sewer, both of which were in excess of the fees established by the ordinance. Hence, the amount of the fee appears reasonable for the purpose for which it is imposed. The trial judge found the fees to be unreasonable charges, but this was premised upon his view that the cost of prospective capital improvements could not be considered in setting the amount of the connection charges.

Our greatest concern in this case was whether the funds collected as a result of the fees were clearly earmarked for capital expansion. The language of the ordinances does not unequivocally mandate the use of the funds for capital improvements. Yet, the evidence shows that the fees were established for this purpose, and the city has steadfastly handled the funds separately with a view toward expanding the monies only for improvements to the respective systems. In this regard we are assisted by the finding of the court below "that the proceeds derived from the $700 connecting fees are earmarked by the city for capital improvements to the systems as a whole." Clearly, the use of such funds must be so limited, and in view of the position taken by the city in this litigation, any use of the funds contrary to these purposes would be subject to appropriate legal sanction.

[5] At the trial, the appellees also attacked the ordinances on constitutional grounds. The judge did not pass on the constitutional questions because, having determined that the fee was a tax which was beyond the authority of the city to assess, he deemed it unnecessary to do so. What we have already said adequately disposes of the constitutional questions. We believe the ordinances are constitutional and do not unlawfully discriminate against newcomers as asserted by appellees. The fees are payable by every person who hereafter connects into the city's water or sewer system, even if he has lived in the city all his life and his property is in the heart of the city. *See* Home Builders Association of Greater Salt Lake v. Provo City, *supra*; Airwick Industries, Inc. v. Carlstadt Sewerage Authority, 1970, 57 N.J. 107, 270 A.2d 18.

The ordinances in question are valid and enforceable. Therefore, the claims for refund sought in appellees' cross-appeal cannot be sustained.

Appellees also filed a petition to review as inadequate a cost judgment entered subsequent to the final judgment. Pursuant to Craft v. Clarembeaux, Fla.App.2d, 1964, 162 So.2d 325, this petition was treated as a Notice of Interlocutory Appeal. In light of our decision in this case, the cost judgment must also be set aside.

Reversed.

BOARDMAN, A. C. J., and SCHEB, J., concur.

**CONTRACTORS AND BUILDERS ASSOCIATION OF PINELLAS COUNTY et al., Petitioners,**

**v.**

**CITY OF DUNEDIN, Florida, Respondent.**

**No. 47662.**

Supreme Court of Florida.

Feb. 25, 1976.

Rehearing Denied April 2, 1976.

Building contractors and landowners brought action challenging municipal ordinance authorizing municipality to charge impact fee for privilege of connecting to its water and sewer system. The Circuit Court, Pinellas County, B. J. Driver, J., adjudged ordinance defective, and city appealed. The District Court of Appeal, 312 So.2d 763, reversed, and contractors and landowners sought review. The Supreme Court, Hatchett, J., held that imposition of fees for connection with utility did not constitute taxation, that ordinance was defective for failure to restrict expenditure of fund created by collection of connection fees, and that issue of whether fees already collected should be refunded would be pretermitted.

Judgment of district court of appeal quashed, and remanded.

**1. Municipal Corporations ⇐956(1)**

Municipality cannot impose tax, other than ad valorem tax, unless authorized by general law. West's F.S.A.Const. art. 7, § 9.

**2. Municipal Corporations ⇐712**

**Waters and Water Courses ⇐203(5)**

In principle, there is nothing wrong with transferring to new user of municipally owned water or sewer system such fair share of costs as new use of system involves.

**3. Municipal Corporations ⇐712**

**Waters and Water Courses ⇐203(5)**

Where connection fees charged new users as precondition for municipal water and sewerage service were less than costs municipality incurred in accommodating new users of its water and sewer systems, such fees merely sought to shift to new users expenses incurred on their account, and did not constitute taxation of users by municipality.

**4. Municipal Corporations ⇐712**

**Waters and Water Courses ⇐203(5)**

Merely because municipal water and sewer rates are set high enough to meet water and sewer system's capital requirements, as well as to defray operating expenses, does not mean that charges therefor cease to be "just and equitable" within meaning of statute governing municipal administration of utilities. West's F.S.A. § 180.13(2).

See publication Words and Phrases for other judicial constructions and definitions.

**5. Municipal Corporations ⇐619**

Municipality is not required to resort to deficit financing in order to raise capital for expansion of utilities, and municipality may legitimately consider raising capital for future outlay in establishing its utility rates and charges. West's F.S.A. § 180.13(2).

**6. Municipal Corporations ⇐619**

Differential rates and charges imposed by municipal utility may be "just and equitable" within meaning of statute governing municipal administration of utilities. West's F.S.A. § 180.13(2).



**7. Municipal Corporations ⇐619**

Raising of capital for expansion of municipal utility, by setting connection charges which do not exceed pro rata share of reasonably anticipated costs of expansion, is permissible where expansion is reasonably required and use of money so collected is limited to meeting costs of expansion.

**8. Municipal Corporations ⇐712**

**Waters and Water Courses ⇐203(5)**

It is not "just and equitable," within meaning of statute governing municipal administration of utilities, for municipally owned utility to impose entire burden of capital expenditures, including replacement of existing plant, on new users connecting to water and sewer system after arbitrarily chosen time. West's F.S.A. § 180.13(2).

**9. Municipal Corporations ⇐619**

For purposes of allocating cost of replacing original utility facilities, it is arbitrary and irrational to distinguish between old and new users of utility, all of whom bear expense of old plant and all of whom will use new plant.

**10. Municipal Corporations ⇐111(1)**

Revenue-producing municipal ordinance must explicitly set forth restrictions on revenues it generates where such restrictions are essential to ordinance's validity. West's F.S.A.Const. art. 7, § 9; West's F.S.A. §§ 672.201, 725.01.

**11. Municipal Corporations ⇐712**

**Waters and Water Courses ⇐203(1)**

Ordinance empowering municipality to impose impact fees to defray cost of administering water and sewerage system failed to include necessary restrictions on use of fund created by such fees, and ordinance was thus defective. West's F.S.A. Const. art. 7, § 9.

**12. Municipal Corporations ⇐619**

Although municipal ordinance was defective for failure to include necessary restrictions on expenditure of fund created by collection of connection fees from new users of municipal utility, municipality was at liberty to adopt new ordinance containing such restrictions, and thus issue of whether funds already collected should be refunded would be pretermitted.

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John T. Allen, Jr., St. Petersburg, for petitioners.

C. Allen Watts, of Fogle & Watts, Deland, for respondent.

Ralph A. Marsicano and Burton M. Michaels, Tallahassee, for the Florida League of Cities, Inc., amicus curiae.

Thomas G. Pelham of Brown, Smith, Young & Pelham, Tallahassee, for the National Home Builders Association, amicus curiae.

HATCHETT, Justice.

In an action for declaratory judgment, brought against the City of Dunedin in Circuit Court, provisions of certain ordinances[1] were adjudged defective, as being an *ultra vires* attempt by the city to impose taxes; and the city was enjoined from collecting fees the ordinances required as a precondition for municipal water and sewerage service. In addition, the Circuit Court ordered the City to refund the fees, but only to persons who had paid under protest. On appeal to the District Court of Appeal, Second District, that court reversed the circuit court judgment, *City of Dunedin, Florida v. Contractors and Builders Association of Pinellas County, etc. et al.*, 312 So.2d 763; and, on June 10, 1975, certified that its decision passed

1. The ordinances setting water and sewerage connection charges or otherwise pertinent are the following:

Sec. 25-14. *Sewage connection required; notice.*

The owner of any house, building, or property used for human occupancy, employment, recreation, or other purpose, situated within the city and abutting on any street, alley or right-of-way in which there is now located or may in the future be located a public sanitary or combined sewer of the city, is hereby required at his expense to install suitable toilet facilities therein, and to connect such facilities directly with the proper public sewer in accordance with the provisions of this chapter, within ninety (90) days after date of official notice to do so, provided that said public sewer is within two hundred (200) feet of the house, building, or properties used for human occupancy. . . .

Sec. 25-31. *Same—Classes of permits; contents; inspection fees.*

There shall be two classes of building sewer permits: (1) for residential and commercial service; and (2) for service to establishments producing industrial waste. In either case, the owner or his agent shall make application on a special form furnished by the city. The permit application shall be supplemented by any plans, specifications, or other information considered pertinent in the judgment of the city sewer superintendent. No permit will be issued unless the assessment as set forth in section 25-71(c) and (d) has been paid. . . .

Sec. 25-32. *Same—Costs paid by owner.*

All costs and expense incident to the installation, connection and maintenance of the building and collector sewers shall be borne by the owners. The owners shall indemnify the city from any loss or damage that may directly or indirectly be occasioned by the installation of the building sewer.

Sec. 25-71. *Meters—Connection or installation charge.*

(a) The connection charge for the installation of a meter inside the city shall be as follows:

| | | |
|---|---|---|
| ⅝" | meter | $ 95.00 |
| 1" | meter | 170.00 |
| 1-½" | meter | 265.00 |
| 2" | meter | 360.00 |

(b) The connection charge for the installation of a meter outside the city limits shall be as follows:

| | | |
|---|---|---|
| ⅝" | meter | $105.00 |
| 1" | meter | 180.00 |
| 1-½" | meter | 290.00 |
| 2" | meter | 390.00 |

(c) In addition to the meter installation charges described herein, there shall be paid an assessment to defray the cost of production, distribution, transmission and treatment facilities for water and sewer provided at the expense of the City of Dunedin, as follows:

| | | |
|---|---|---|
| Each dwelling unit; | for water | $325.00 |
| | for sewer | 475.00 |
| Each transient unit; | for water | 150.00 |
| | for sewer | 275.00 |
| Each business unit; | for water | 325.00 |
| | for sewer | 475.00 |

(d) The assessments as set forth herein shall be payable upon issuance of the building permit for said unit or units in the case of new construction, or in the case of a presently existing structure or structures, such assessments shall be payable when the permits for water or sewer connections are issued.

Petitioners challenge as unlawful the fees prescribed by Dunedin, Fla.Code § 25-71(c).



upon a question of great public interest. As is customary in cases where such certificates have been entered, we exercise our discretion to review on its merits the decision below. *E. g., Grant v. State*, 316 So.2d 282 (Fla.1975); *Winston v. State*, 308 So.2d 40 (Fla.1974) (reh. den. 1975). *See* Fla.Const. art. V, § 3(b)(3).

**[1, 2]** Plaintiffs in the trial court, petitioners here, are building contractors, an incorporated association of contractors, and owners of land situated within the city limits of Dunedin.[2] They do not complain of all the fees Dunedin requires to be collected upon issuance of building permits,[3] but contend that monies which the city collects and earmarks for "capital improvements to the [water and sewerage] system as a whole" (R. 725) constitute taxes, which a municipality is forbidden to impose, in the absence of enabling legislation. It is agreed on all sides that "a municipality cannot impose a tax, other than ad valorem taxes, unless authorized by general law," 312 So.2d at 766, and that no general law gives such authorization here. Respondent contends that these fees are not taxes, but user charges analogous to fees collected by privately owned utilities for services rendered. For the reasons stated in Judge Grimes' scholarly opinion, we accept this analogy, but we decline to uphold a revenue generating ordinance that omits provisions we deem crucial to its validity. We are unpersuaded, moreover, that the limitations, which the city has in fact placed on fees collected pursuant to Dunedin, Fla., Code §§ 25-31, 25-71(c) and (d), can suffice to make those fees "just and equitable", within the meaning of Fla.Stat. § 180.13(2) (1973). In principle, however, we see nothing wrong with transferring to the new user of a municipally owned water or sewer system a fair share of the costs new use of the system involves.

Petitioners contend that Dunedin has imposed a tax under the guise of setting charges for water and sewer connections, relying on *Broward County v. Janis Development Corp.*, 311 So.2d 371 (Fla. 4th Dist.1975) aff'g *Janis Development Corp. v. City of Sunrise*, 40 Fla.Supp. 41 (17th Cir. 1973); *Pizza Palace of Miami v. City of Hialeah*, 242 So.2d 203 (Fla. 3d Dist. 1972); and *Venditti-Siraro, Inc. v. City of Hollywood*, 39 Fla.Supp. 121 (17th Cir. 1973). The *Pizza Palace* case is wholly inapposite, and the others are readily distinguishable. Only if the moneys collected in *Venditti-Siraro* and *Janis Development* had been used to underwrite the administrative costs of issuing building permits, or

2. Petitioners take the position that the ordinance is bad, if for no other reason, then because it denies equal protection of the laws to new residents of Dunedin. There is a substantial question whether petitioners here have standing to assert new residents' rights. *Construction Industry Association of Sonoma County v. City of Petaluma*, 522 F. 2d 897, 44 U.S.L.W. 2093 (9th Cir., 1975). Assuming standing *arguendo*, the ordinance easily meets the rational basis test, see *post*, pp. 319-320, and no right to travel interstate is affected, contrary to petitioners' assertion. *Cf.* Annot., 63 A.L.R.3d 1184 (1975). In *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969), welfare recipients were disqualified as such for one year by moving into Connecticut. Under Dunedin's ordinance, a joint water and sewer connection costs approximately $800.00, regardless of whether the new user comes from Dunedin, elsewhere in Florida, or from another state or country.

3. In the event of connection to an existing structure, the fees are payable "when the permits for water or sewer connections are issued." Dunedin, Fla.Code § 25-71(d). The complaint here did not allege existing structures on the plaintiffs' land, however.

other costs incurred in enforcing building codes, would those cases be analogous to the present one. Compare *State ex rel. Harkow v. McCarthy*, 126 Fla. 433, 171 So. 314 (1936) with *City of Panama City v. State*, 60 So.2d 658 (Fla.1952). The analogy would be very close if the fees had been earmarked for future capital outlay: for example, acquisition of automobiles for building inspectors to use in their work.

[3] But the fees in *Janis Development* and *Venditti-Siraro* bore no relationship to (and were greatly in excess of) the costs of the regulation which was supposed to justify their collection. In each case, the fees were required to be paid as a condition for issuance of building permits. In the *Janis Development* case, $200.00 per dwelling unit built was put into a fund for road maintenance. In *Venditti-Siraro*, one percent of estimated construction costs went into a fund for parks. Because the surcharges were collected for purposes extraneous to the enforcement of the building code, the courts concluded that the surcharges amounted in law to taxes, which the municipalities had not been authorized to impose. In contrast, evidence was adduced here that the connection fees were less than costs Dunedin was destined to incur in accommodating new users of its water and sewer systems. We join many other courts in rejecting the contention that such connection fees are taxes.[4]

The avowed purpose of the ordinance in the present case is to raise money in order to expand the water and sewerage systems, so as to meet the increased demand which additional connections to the system create. *The municipality seeks to shift to the user expenses incurred on his account.* A private utility in the same circumstances would presumably do the same thing, in which event surely even petitioners would not suggest that the private corporation was attempting to levy a tax on its customers.[5]

Under the constitution, Dunedin, as the corporate proprietor of its water and sewer systems, can exercise the powers of any other such proprietor (except as Fla.Stat. §§ 180.01 *et seq.*, or statutes enacted

4. The Supreme Court of Illinois, in *Hartman v. Aurora Sanitary District*, 23 Ill.2d 109, 177 N.E.2d 214 (1961), observed at 219:

> We have found that such reasonable charges have been uniformly sustained as a service charge rather than a tax. *City of Maryville v. Cushman*, 363 Mo. 87, 249 S.W.2d 347; *State ex rel. Gordon v. Taylor*, 149 Ohio St. 427, 79 N.E.2d 127; *City of North Muskegon v. Bolema Construction Co.*, 335 Mich. 520, 56 N.W.2d 371; *Chastain v. Oklahoma City*, 208 Okl. 604, 258 P.2d 635.

5. Petitioners contend that utility revenues constitute taxes, to the extent such revenues are expended for purposes unrelated to the utility. Nothing prohibits a muncipality's "making a modest return of its utility operation or certain portions thereof, providing the rate is not unreasonable." *Pinellas Apartment Ass'n v. City of St. Petersburg*, 294 So.2d 676, 678 (Fla. 2d Dist. 1974); *Mitchell v. Mobile*, 244 Ala. 442, 13 So.2d 664 (1943). *Contra, Madera v. Black*, 181 Cal. 306, 184 P. 397 (1919). Augmenting general revenues is a natural use for such profits, and general revenues are expended for the whole range of municipal purposes. Privately held utilities also apply a modest portion of revenues to public or charitable purposes, and such charitable contributions are counted as operating expenses, when rates and charges are calculated. *Miami v. Florida Public Service Comm'n*, 208 So.2d 249, 258–9 (Fla.1968) ("if contributions are of a *reasonable amount* to recognized and appropriate charities, then they may be classified as legitimate operating expenses." At 259); Re *General Telephone Co.*, 44 P.U.R. 2d 247 (Fla.R.R. & P.U.C.1962). See generally Annot., 59 A.L.R.3d 941 (1974). Just as a modest surplus over costs of regulation does not invalidate regulatory fees, *State ex rel. Harkow v. McCarthy*, 126 Fla. 433, 171 So. 314 (1936) (parking meters permissible unless "city was making inordinate and unjustified profits" At 317), so a modest profit from operation of a public utility does not transform user charges into taxes. *Pinellas Apartment Ass'n v. City of St. Petersburg, supra.* On the other hand, unreasonable reliance on utility revenues does amount to "imposing upon [ratepayers] unfair tax burdens." *Mitchell v. Mobile*, 13 So.2d at 667. *Cf. City of Panama City v. State*, 60 So.2d 658 (Fla.1952).



hereafter, may otherwise provide.)[6] Municipal corporations have "governmental, corporate and proprietary powers" and "may exercise any power for municipal purposes, except as otherwise provided by law." Fla.Const. art. VIII, § 2(b); *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So.2d 801 (Fla.1972).[7] "Implicit in the power to provide municipal services is the power to construct, maintain and operate the necessary facilities." *Cooksey v. Utilities Commission*, 261 So.2d 129, 130 (Fla. 1972). There are no provisions in Chapter 180, Florida Statutes, expressly governing capital acquisition other than through deficit financing,[8] but it is provided that the "legislative body of the municipality . . . may establish just and equitable rates or charges" for water and sewerage. Fla.Stat. § 180.13(2) (1973). See generally Annot., 61 A.L.R.3d 1236, 1248–1259 (1975).

When a municipality sells debentures as a means of financing the extension or enlargement of a public utility, the indebtedness thus incurred is eventually made good with utility revenues; and anticipated revenues "may be pledged to secure moneys advanced for the . . . improvement." Fla.Stat. § 180.07(2) (1973). When money for capital outlay is borrowed, water and sewer rates are set with a view towards raising the money necessary to repay the loan. *State v. City of Tampa*, 137 Fla. 29, 187 So. 604, 609 (1939); *State v. City of Miami*, 113 Fla. 280, 152 So. 6 (1933) (*reh. den.* 1934) ("certificates of indebtedness . . . are payable as to both principal and interest solely out of a special fund to be created . . . out of the net earnings" At 13).

[4, 5] Water and sewer rates and charges do not, therefore, cease to be "just and equitable" merely because they are set high enough to meet the system's capital requirements, as well as to defray operating expenses. *State v. City of Tampa, supra; State v. City of Miami, supra.*

6. Chapter 180 was enacted before the 1968 Constitution was adopted, and some language in the chapter is anachronistic. The statutes" refer to "powers granted by this chapter," Fla.Stat. §§ 180.03(1), .21 (1973), whereas, under the 1968 Constitution, the provisions of Chapter 180 are restrictions on the exercise of power the constitution itself confers, rather than the grant of powers these statutory provisions formerly constituted.

7. But a municipality's power to tax is subject to the restrictions enumerated in Fla.Const. art. VII § 9 including the restriction discussed above. *City of Tampa v. Birdsong Motors, Inc.*, 261 So.2d 1 (Fla.1972).

8. Special assessments are another common means of financing sewer construction. Fla. Stat. § 170.01 (1973). The fees in controversy here are not special assessments. They are charges for use of water and sewer facilities; the property owner who does not use the facilities does not pay the fee. Under no circumstances would the fees constitute a lien on realty.

We see no reason to require that a municipality resort to deficit financing, in order to raise capital by means of utility rates and charges. On the contrary, sound public policy militates against any such inflexibility.[9] It may be a simpler technical task to amortize a known outlay, than to predict population trends and the other variables necessary to arrive at an accurate forecast of future capital needs. But raising capital for future use by means of rates and charges may permit a municipality to take advantage of favorable conditions, which would alter before money could be raised through issuance of debt securities; and the day may not be far distant when municipalities cannot compete successfully with other borrowers for needed capital. The weight of authority supports the view that raising capital for future outlay is a legitimate consideration in setting rates and charges. *Hayes v. City of Albany*, 7 Or.App. 277, 490 P.2d 1018 (1971); *Hartman v. Aurora Sanitary District*, 23 Ill.2d 109, 177 N.E.2d 214 (1961); *Home Builders Ass'n of Greater Salt Lake v. Provo City*, 28 Utah 2d 402, 503 P.2d 451 (1972).

[6] It is also established that differential utility rates and charges may be "just and equitable". Fla.Stat. § 180.13(2) (1973); *Hayes v. City of Albany, supra*, notwithstanding the differential. In *Brandel v. Civil City of Lawrenceburg*, 249 Ind. 47, 230 N.E.2d 778 (1967), the court upheld an ordinance setting differential connection charges where two distinct sewerage systems had been engineered in the same political entity. The user connecting to the more expensive system paid a higher connection charge. Another common type of differential charge makes the character of the user determinative of utility rates:

> In determining reasonable rate relationships, a municipality may sometimes take into account the purpose for which a customer receives the service. . . . Courts have recognized that differences in sewer use rates for residential customers and various other customers may be reasonable. Some customers may be subject to a flat rate while other customers are subject to rates based on water consumption or type and number of receptacles. *Rutherford v. City of Omaha*, 183 Neb. 398, 160 N.W.2d 223, 228 (1968) (authorities omitted)

Dunedin distinguishes between residential and commercial users, on one hand, and industrial users, on the other. See *ante*, pp. 316–317 n. 1, and petitioners do not question this distinction. Here the issue is whether differential connection charges are "just and equitable", when they vary depending on the time at which the connection to the utility system is made.

[7, 8] Raising expansion capital by setting connection charges, which do not exceed a *pro rata* share of reasonably anticipated costs of expansion, is permissible where expansion is reasonably required, *if*

9. Petitioners cite *Norwick v. Village of Winfield*, 81 Ill.App.2d 197, 225 N.E.2d 30 (2d Dist.1967) in which it was held that an Illinois municipality was without authority to raise money for future capital requirements, by collecting connection fees in excess of actual connection costs. But the decision in that case turned on the construction of a statute granting the Village of Winfield municipal powers, and is of no relevance to the present case. The Illinois court remarked: "The Village directs our attention to foreign cases. These are of no assistance . . . . This is particularly true in states with so-called 'home rule' municipalities [like Florida]."



*use of the money collected is limited to meeting the costs of expansion.*[10] Users "who benefit expecially, not from the maintenance of the system, but by the extension of the system . . . should bear the cost of that extension." *Hartman v. Aurora Sanitary District, supra*, 177 N.E. 2d at 218. On the other hand, it is not "just and equitable" for a municipally owned utility to impose the entire burden of capital expenditures, including replacement of existing plant, on persons connecting to a water and sewer system after an arbitrarily chosen time certain.

The cost of new facilities should be borne by new users to the extent new use requires new facilities, but only to that extent. When new facilities must be built in any event, looking only to new users for necessary capital gives old users a windfall at the expense of new users.

[9] When certificates of indebtedness are outstanding, new users, like old users, pay rates which include the costs of retiring the certificates, which represent original capitalization. *State v. City of Miami, supra*. New users thus share with old users the cost of original facilities. For purposes of allocating the cost of replacing original facilities, it is arbitrary and irrational to distinguish between old and new users, all of whom bear the expense of the old plant and all of whom will use the new plant.[11] The limitation on use of the funds, shown to exist *de facto* in the present case, has the effect of placing the whole burden of supplementary capitalization, including replacement of fully depreciated assets, on a class chosen arbitrarily for that purpose.

In *Hayes v. City of Albany, supra*, the situation was very much like the situation here. An existing system faced the imminent prospect of expansion and, as of a date certain, residential connection fees climbed from $25 to $255. (An hypothetical industrial user's charges soared from $200 to a prohibitive $400,000.) These charges were to be deposited in a fund restricted as follows:

> All monies received from the Sewer Connection Charges plus interest, if any, shall be deposited in the Sanitary Sewer Capital Reserve Fund . . . and shall be expended from that fund only for the purpose of making major emergency repairs, extending or oversizing, separating, or constructing new additions to the treatment plant or collection and interceptor systems. 490 P.2d at 1020.

If the ordinance in the present case had so restricted use of the fees which it required to be collected, there would be little question as to its validity. We conclude that the ordinance in the present case cannot stand as it is written.

[10] The same considerations which underlie statutes of frauds require that a revenue producing ordinance explicitly set forth restrictions on revenues it generates, where such restrictions are essential to its

10. The "costs of expansion" may sometimes be difficult to identify precisely when certain kinds of capital expenditures are made; in this matter, too, "perfection is not the standard of municipal duty." *Rutherford v. City of Omaha, supra* 160 N.W.2d at 228.

11. There is authority to the contrary. *Hartman v. Aurora Sanitary District, supra; Home Builders Ass'n of Greater Salt Lake v. Provo City, supra.* In *Provo City*, an ordinance like Dunedin's was upheld even though the fees were used for "general operating expenses," 503 P.2d at 451. We reject the view these cases represent.

validity. As between private parties, a contract "that is not to be performed within the space of one year", Fla.Stat. § 725.-01 (1973), or which is "for the sale of goods for the price of $500 or more", Fla. Stat. § 672.201 (1973), is unenforceable unless reduced to writing, with certain exceptions not pertinent here. Counsel for respondent has represented that the fees collected under the ordinance exceed $196,000.00. Brief for Respondent at 53. Nothing in the record indicates that capital outlay for expansion will be completed within a year's time.

[11, 12] The failure to include necessary restrictions on the use of the fund is bound to result in confusion, at best. City personnel may come and go before the fund is exhausted, yet there is nothing in writing to guide their use of these moneys, although certain uses, even within the water and sewer systems, would undercut the legal basis for the fund's existence. There is no justification for such casual handling of public moneys, and we therefore hold that the ordinance is defective for failure to spell out necessary restrictions on the use of fees it authorizes to be collected.[12]

Nothing we decide, however, prevents Dunedin from adopting another sewer connection charge ordinance, incorporating appropriate restrictions on use of the revenues it produces. Dunedin is at liberty, moreover, to adopt an ordinance restricting the use of moneys already collected. We pretermit any discussion of refunds for that reason.

The decision of the District Court of Appeal is quashed and this case is remanded to the District Court with directions that the District Court dispose of the question of costs; and that the District Court thereafter remand for further proceedings in the trial court not inconsistent with this opinion. In the trial court's consideration *de novo* of the question of refunds the chancellor is at liberty to take into account all pertinent developments since entry of his original decree.

It is so ordered.

ADKINS, C. J., and ROBERTS, OVERTON and ENGLAND, JJ., concur.

12. If subsection c were excised from Dunedin, Fla.Code § 25-71, the ordinance would be unobjectionable, because reasonable meter connection charges may permissibly furnish utility revenues for unrestricted use within the utility system. The validity of such charges does not depend on limitation of their use.



**IN THE**
**CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA**

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**CIRCUIT CIVIL NO. 73-827**

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CONTRACTORS AND BUILDERS ASSOCIATION OF PINELLAS COUNTY, etc., et al.,
*Plaintiffs,*
*vs.*
THE CITY OF DUNEDIN, FLORIDA, etc.,
*Defendant.*

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**SUPPLEMENTAL JUDGMENT**

This cause is before the Court pursuant to mandate of the Supreme Court directing that the issue of whether plaintiffs are entitled to refund of the moneys collected by defendant City under the Impact Fee Ordinance be considered de novo. CONTRACTORS AND BUILDERS ASSOCIATION etc., vs. CITY OF DUNEDIN, 329 So.2nd 314.

The Supreme Court in the opinion written by Mr. Justice Hatchett invited the City to correct the deficiencies in the impact fee ordinances when it stated:

> "Dunedin is at liberty, moreover, to adopt an ordinance restricting the use of the moneys already collected."

This suggestion was accepted with alacrity. The City on August 23, 1977, adopted Ordinance 76-19 to supplement Ordinance 74-19, adopted June 3, 1974. These two ordinances when construed together substantially track and echo the language of the Supreme Court in delineating the requirements necessary to impose a valid impact fee.

This Court finds that Ordinances 74-19 and 76-19 are legally sufficient to permit the imposition and collection of an "impact fee". This finding, however, does not put at rest the issue of whether the City is to retain the fees already collected or whether they should be refunded to plaintiffs.

Plaintiffs gracefully, if not happily, have not quibbled with the pronouncement quoted above that the City was at liberty to enact ordinances authorizing retention of the moneys already collected.

This Court does not construe the comment of Mr. Justice Hatchett as a prejudgment that any ordinance adopted would not be subject to judicial review as to its application to the rights of the parties; to the contrary, this Court is satisfied that all that was intended by the language alluded to was that the City was not foreclosed from endeavoring to correct the oversight which it had made in the adoption of the original impact fee ordinance. This Court is supported in its construction of the language by the concluding language of Mr. Justice Hatchett when he stated:

> "In the trial court's consideration de novo of the question of refunds the chancellor is at liberty to take into account all pertinent developments since entry of his original decree."

This Court is concerned with the question of whether the City by enactment of an ordinance can take from a private party moneys which were due at the time the ordinance was enacted. This question parodies one posed by Mr. Justice Holmes, United States Supreme Court, in FORBES PIONEER BOAT LINE vs. BOARD OF COMMISSIONERS, 258 U.S. 338, 66 L.Ed. 647, (hereinafter cited as FORBES PIONEER). The facts and issues of law between the case now before this Court and the one before the court in Forbes Pioneer are of rare and striking similarities. In Forbes Pioneer plaintiff operated passenger boats over a system of publicly owned canals in and around Lake Okeechobee and South Florida. The Board of Commissioners to operate the canal constructed locks, which plaintiff's boats had to pass through. To help defray the cost of operating and maintaining the locks the Commissioners imposed a fee for passage. This fee was protested and an action brought in the Circuit Court in Dade County. The law suit was prosecuted on the theory that the legislative Act creating the canal district did not contain authority to collect fees for the use of the canals and improvements.

Plaintiff Forbes Pioneer appealed an adverse judgment in the Circuit Court to the Supreme Court of Florida. The



Supreme Court of Florida in FORBES PIONEER BOAT LINE vs. EVERGLADES DRAINAGE DISTRICT, 77 Fla. 742, 82 So. 346, declared that the canal commission was without authority to impose and collect the fee under the Act creating the canal authority. The same day the Supreme Court of Florida knocked out the right of the Commissioners to collect fees, the State legislature, which was in session, attempted to correct the situation and enacted into law Chapter 7865, Acts of 1919, which purportedly validated the collection of fees which had theretofore been made and which the Supreme Court of Florida had declared was done without authority. The Act in addition to validating collections previously made undertook to prescribe the use and disposition of toll fees for the use and improvement of the canal system. Consequent upon the mandate of the Supreme Court, the matter reverted to the trial court where FORBES PIONEER sued to recover the moneys which had been unlawfully extracted from it as tolls. The Commission asserted as a defense to the refund Chapter 7865, Acts of 1919, supra. The trial Court entered judgment for plaintiff awarding a refund of the tolls which had been collected without authority.

This latter judgment was again appealed to the Supreme Court of Florida. The Supreme Court reversed the judgment in favor of plaintiff, holding that the legislature had the power by the enactment of Chapter 7865 to retroactively validate the collection of those tolls previously made. BOARD OF COMMISSIONERS EVERGLADES DRAINAGE DISTRICT vs. FORBES PIONEER BOAT LINE, 80 Fla. 252, 86 So. 199.

Notwithstanding only $649.21 was involved, Forbes Pioneer took an appeal to the United States Supreme Court. FORBES PIONEER BOAT LINE vs. BOARD OF COMMISSIONERS EVERGLADES DRAINAGE DISTRICT, supra.

The United States Supreme Court reversed the Florida court pointing out that while the Florida court had relied on UNITED STATES vs. HEINZEN 206 U.S. 370, 51 L.Ed. 1098, 27 S.Ct.Rep. 742, in doing so the Florida court had exceeded the reach of HEINZEN and in so doing had committed error.

The United States Supreme Court discussing the extent to which unlawful Acts may be ratified by legislation retrospective in nature pointed out:

> "But, generally, ratification of an act is not good if attempted at a time when the ratifying authority could not lawfully do the act. BIRD vs. BROWN, 4 Exch. 786, 154 Eng.Reprint 1433, 19 L.J. Exch. N.S. 154, 14. Jur.132, 23 Eng.Rul. Cas. 422. If we apply that principle this statute is invalid. For if the legislature of Florida had attempted to make the plaintiff pay in 1919 for passages through the lock of a canal that took place in before 1917, without any promise of reward, there is nothing in the case as it stands to indicate that it could have done so any more effectively than it could have made a man pay a baker for a gratuitous deposit of rolls."

It was further pointed out that the policy of permitting retroactive legislation was founded upon this principal:

> "In those cases it is suggested that the meaning simply is that constitutional principles must leave some play to the joints of the machine. But courts cannot go very far against the literal meaning and plain intent of a constitutional text."

The holding of Forbes Pioneer has been cited favorably by the Florida courts. BEDELL vs. LASSITER, 196 So. 699; PETITION OF ROCAFORT, 186 So.2nd 496.

The facts and principles in the case under consideration is an overlay of those found in Forbes Pioneer.

In Forbes Pioneer there was a charge imposed for use of a public owned facility, i.e., locks and canal waters; in this case a fee was imposed for the use of a publicly owned facility, i.e., Sewer and Water System of Dunedin; in Forbes Pioneer legislative authority to impose tolls was found lacking; in this case the ordinance authorizing the impact fee was found lacking; in Forbes Pioneer an action to obtain a refund of unlawfully paid tolls was brought and judgment entered for plaintiff; in this case judgment was entered entitling plaintiffs to a refund of impact fees unlawfully collected; in Forbes Pioneer legislation was enacted to ratify tolls which had been unlawfully collected and to prescribe their use; in this case Ordinances 74-19 and 76-19 have been enacted, purportedly to retroactively ratify the unlawful collection of the impact fees.



The same Constitution which the Supreme Court relied upon to reverse the judgment denying refund to the Boat Company in Forbes Pioneer is still viable and applicable to the issue before this Court. This Court being persuaded that the issues before it are controlled by the principles in Forbes Pioneer, supra, it necessarily follows that the enactment of Ordinances 74-19 and 76-19 cannot justify denying to plaintiffs their right to a refund of the impact fees paid under protest.

One additional facet of the issue is worthy of comment. It has been suggested by some authorities, notably HUTTON vs. AUTORIDAD SOBRE HOGARES DE LA CAPITAL, 78 F.Supp. 988, that only those rights which have become vested are immune from impairment from retroactive legislation which ratifies the unlawful collection of funds. In this case the Court finds that plaintiffs' rights to refund became vested prior to the enactment of Ordinances 74-19 and 76-19 and were firmly fixed by the judgment which had been entered in this Court.

Though not necessary, it is appropriate to pass upon one other issue raised by the parties.

Explicit in the mandate of the Court in this action is the rule that the new users of a utility should be charged only a fair and equitable share for the cost of the improvements and what is fair and equitable is to be gauged by the increased demands by the new users and that the improvements required by the new users must be specifically earmarked to justify collection of fees different from existing users.

This Court finds from the proofs before it that all of the improvements which the impact fees in issue were collected for are now in existence and are being paid for from the proceeds of a bond issue floated by the City of Dunedin. The disputed impact fees are in escrow and have not been spent, contrary to previous suggestions that they had been used in part to purchase the DYNAFLOW SYSTEM. Plaintiffs are paying their proportionate share of the bond issue as are the old users of the municipal water and sewer system. Patently, the funds collected from the impact fees which are now in escrow will not be used for construction or improvement of facilities being used by plaintiffs, but will necessarily be applied to other projects. These facts invalidate the requirements set forth by the Supreme Court in upholding a valid impact fee.

It may be argued that the City advanced the moneys through the bond issue to pay in part for the projects for which the impact fees had been collected. This is sheer rationalization and will not justify departure from the stringent requirements laid down by the Supreme Court; wherefore, it is

ORDERED AND ADJUDGED that

A. On the issue of the right of plaintiffs to refund of the sums paid to the City of Dunedin as impact fees collected pursuant to the Code of the City of Dunedin, Section 25-31 and 25-71, the Court finds for plaintiffs and against defendant, and the City of Dunedin shall refund to plaintiffs as hereinafter ordered by the Court.

B. The Court retains jurisdiction of the parties, the subject matter, and of the funds in issue, for the purpose of determining the members of the class who shall be entitled to refund and the amounts of said refund, and for the awarding of attorneys' fees to plaintiffs' counsel.

C. The Court directs supplemental proceedings be had to enforce the executory provision of this Judgment.

IT IS SO ORDERED AND ADJUDGED in Chambers in Clearwater, Pinellas County, Florida, this 27th day of May, 1977.

B. J. DRIVER,
Circuit Judge



**The CITY OF DUNEDIN, Florida, a Municipal Corporation, Appellant,**

**v.**

**CONTRACTORS AND BUILDERS ASSOCIATION OF PINELLAS COUNTY etc., et al., Appellees.**

**No. 77-1110.**

District Court of Appeal of Florida, Second District.

May 5, 1978.

Following appeal to the Supreme Court, 329 So.2d 314, and remand from the District Court of Appeal, 330 So.2d 744, the Circuit Court, Pinellas County, B. J. Driver, J., held that persons who had previously paid impact fees for the privilege of connecting to city's water and sewer systems were entitled to refunds. On appeal, the District Court of Appeal, Ryder, J., held that even though impact fee ordinance was defective for failure to spell out necessary restrictions on use of fees collected, persons who had previously paid impact fees under protest were not entitled to refund since city initially had the authority to exact the fees.

Reversed.

**Municipal Corporations ⇐712**
**Waters and Water Courses ⇐203(15)**

Even though impact fee ordinance was defective for failure to spell out necessary restrictions on use of fees collected, persons who had previously paid impact fees for the privilege of connecting to city's water and sewer systems under protest were not entitled to refunds since city initially had the authority to exact such fees.

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C. Allen Watts of Fogle, Watts, Biernacki & Fogle, P. A., DeLand, for appellant.

John T. Allen, Jr., P. A., St. Petersburg, for appellees.

RYDER, Judge.

We are revisited by adversaries in a case involving the authority of a municipality to charge a so-called "impact fee" for the privilege of connecting to its water and sewer systems. This time, the issue is whether appellees are entitled to refund of impact fees previously paid under protest to the City of Dunedin.

In *City of Dunedin v. Contractors and Builders Association of Pinellas County*, 312 So.2d 763 (Fla.2d DCA 1975), we reversed the judgment of the trial court and held certain ordinances adopted by Dunedin in 1972 which imposed "impact fees" valid and enforceable. A properly drafted impact fee ordinance is lawful and not an unauthorized tax. We, however, were concerned by the fact that the terms of the City's ordinances did not unequivocally mandate the use of the funds for capital improvements of the water and sewer systems, but nevertheless opined the ordinance was valid since the City had in fact earmarked the proceeds for capital improvements to the systems as a whole. Thereafter, we certified the matter to the Supreme Court as one of great public interest.

The Supreme Court, in *Contractors and Builders Association of Pinellas County v. City of Dunedin*, 329 So.2d 314 (Fla.1976), agreed, in general, with this court's reasoning regarding the validity of imposing impact fees, but held the Dunedin ordinances defective for failure to spell out necessary restrictions on the use of fees collected. Thus, the Supreme Court quashed this court's opinion and remanded the matter to

the trial court for further proceedings consistent with its opinion.

While the prior appeal was pending, the City of Dunedin had enacted Ordinance No. 74–19. Ordinance 74–19 provided that the proceeds accumulated by the fees can be used only for the expansion of the water or sewer system and trust funds were established therefor. After remand, the City enacted Ordinance No. 76–19. Ordinance 76–19 provided that the use of any funds previously collected under the 1972 Ordinances is restricted to extension or construction of new additions to the treatment plant and systems so as to meet the increased demand which additional connections to the system create.

Also during the appeal of this case, due to the dire need for sewer and water system expansion, the City of Dunedin engaged in the issuance of bonds in 1974 for enlargement of the City's sewer and water system. However, the disputed impact fees still remain in escrow and have not been spent.

After remand from the Supreme Court, the trial court conducted proceedings. A motion for summary judgment by the City of Dunedin on the basis of these ordinances was denied. The trial court held an evidentiary hearing and subsequently entered its supplemental judgment in which it declared Ordinances 74–19 and 76–19 "legally sufficient to permit the imposition and collection of an impact fee." However, the trial court also stated that the enactment of Ordinances 74–19 and 76–19 could not justify denying appellees their right to a refund of the impact fees they had previously paid under protest. For authority, the trial court cited *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338, 42 S.Ct. 325, 66 L.Ed. 647 (1921).

Further, the trial court wrote in its supplemental judgment that "though not necessary, it is appropriate to pass upon one other issue raised by the parties" and made the finding that all of the improvements for which the impact fees in issue were collected are now in existence and are being paid from the proceeds of the bond issue floated by the City in 1974. This appeal ensues.

There is no question that a municipality may now impose "impact fees." The only question we have before us now is whether or not those appellees who paid impact fees under protest are entitled to a refund.

The supreme court's decision in *Contractors, supra*, is the law of the case. Consequently, we affirm that portion of the judgment finding the ordinances legally sufficient to permit the City to impose and collect impact fees; however, we reverse that portion of the judgment which orders a refund of impact fees paid under protest.

The *Forbes* case, is inapplicable to the case *sub judice*. The *Forbes* case involved the unlawful exaction of tolls by a drainage district from persons utilizing the lock of a canal. As the litigation to recover the fees so collected progressed, the Florida Legislature passed an act that purported to validate their collection. However, the United States Supreme Court held that ratification of an act is not good if attempted at a time when the ratifying authority could not do the act. In other words, the drainage district was *without authority* to exact a charge for the passage of the plaintiff's boat through the canal, and the United States Supreme Court held that the authority could not be later conferred retroactively by the State Legislature so as to permit the drainage district to keep the charge exacted from plaintiff.

On the contrary, in instant case the City of Dunedin initially had the authority to exact an impact fee and, further, we are very much persuaded by the words of Mr. Justice Hatchett in *Contractors, supra*, wherein he wrote " . . . Nothing we



decide, however, prevents Dunedin from adopting another sewer connection charge ordinance, incorporating appropriate restrictions on use of the revenues it produces. Dunedin is at liberty, *moreover*, to adopt an ordinance restricting the use of moneys *already* collected. We pretermit any discussion of refunds for that reason." [Emphasis ours] 329 So.2d 314 at 322.

The very question of refunds was before the Florida Supreme Court at the time it issued its decision. Had the Supreme Court wished to order a refund of these impact fees to appellees then, it would have done so at that time. However, it pretermited this question to allow the City to adopt an ordinance restricting the use of the moneys *already* collected. Although Mr. Justice Hatchett also indicated that during the trial court's consideration *de novo* of the question of refunds the chancellor was at liberty to take into account all pertinent developments since entry of his original decree, we are of the opinion that the City has followed the directions of the supreme court explicitly. It has specifically earmarked the impact funds for the water and sewer system expansion. Those funds may now be used for the purposes of further expansion or retiring bonds issued for the earlier [post–1974] expansion of the system.

Consequently, that portion of the chancellor's supplemental judgment ordering the return of the fees to those persons paying under protest is REVERSED.

BOARDMAN, C. J., and GRIMES, J., concur.

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF THE STATE OF FLORIDA

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CASE NO. 77-1110

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THE CITY OF DUNEDIN, FLORIDA,
a municipal corporation,
*Appellant,*
*vs.*
CONTRACTORS AND BUILDERS ASSOCIATION
OF PINELLAS COUNTY, etc., et al.,
*Appellees.*

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## PETITION FOR REHEARING

The petition for rehearing of appellees, respectfully represents:

1. A decision adverse to appellees was filed herein May 5, 1978, and this petition for rehearing is timely filed.

2. In its decision, this Court specifically alluded to the finding by the trial judge that refunds were appropriate to appellees because improvements for which the impact fees in issue were collected are now in existence and are being paid from proceeds from the bond issue. Specifically, in its opinion, this Court stated:

> "Further, the trial court wrote in its supplemental judgment that 'though not necessary, it is appropriate to pass upon one other issue raised by the parties' and made the finding that all of the improvements for which the impact fees in issue were collected are now in existence and are being paid from the proceeds of the bond issue floated by the City in 1974. This appeal ensues."

3. The lower court in its judgment specifically held that without repayment to appellees, the appellees would be charged twice for the same capital improvements by paying once through impact fees and again through water rates:



> "One additional facet of the issue is worthy of comment. It has been suggested by some authorities, notably HUTTON vs. AUTORIDAD SOBRE HOGARES DE LA CAPITAL, 78 F.Supp. 988, that only those rights which have become vested are immune from impairment from retroactive legislation which ratifies the unlawful collection of funds. In this case the Court finds that plaintiffs' rights to refund became vested prior to the enactment of Ordinances 74-19 and 76-19 and were firmly fixed by the judgment which had been entered in this Court.
>
> "Though not necessary, it is appropriate to pass upon one other issue raised by the parties.
>
> "Explicit in the mandate of the Court in this action is the rule that the new users of a utility should be charged only a fair and equitable share for the cost of the improvements and what is fair and equitable is to be gauged by the increased demands by the new users and that the improvements required by the new users must be specifically earmarked to justify collection of fees different from existing users.
>
> "This Court finds from the proofs before it that all of the improvements which the impact fees in issue were collected for are now in existence and are being paid for from the proceeds of a bond issue floated by the City of Dunedin. The disputed impact fees are in escrow and have not been spent, contrary to previous suggestions that they had been used in part to purchase the DYNAFLOW SYSTEM. *Plaintiffs are paying their proportionate share of the bond issue as are the old users of the municipal water and sewer system.* Patently, the funds collected from the impact fees which are now in escrow will not be used for construction or improvement of facilities being used by plaintiffs, but will necessarily be applied to other projects. These facts invalidate the requirements set forth by the Supreme Court in upholding a valid impact fee." (Emphasis supplied)

THEREFORE, this Court has overlooked and failed to rule upon the validity of the trial judge's ruling. As the trier of fact, there is unquestionably substantial competent evidence in the record to support his decision. This Court should not reverse

the judgment in this cause before ruling upon the validity of this finding. This Court has ruled upon the law of the case as established by the Supreme Court in this cause; however, the Court has overlooked and failed to consider that the Supreme Court also in that very decision stated:

> "Raising expansion capital by setting connection charges, which do not exceed a *pro rata* share of reasonably anticipated costs of expansion, is permissible where expansion is reasonably required, *if use of the money collected is limited to meeting the costs of expansion*. Users 'who benefit especially, not from the maintenance of the system, but by the extension of the system...should bear the cost of that extension.' Hartman v. Aurora Sanitary District, supra, 177 N.E. 2d at 218. * *" (Opinion at page 320) (Emphasis by the Court)
>
> * * * * * * * * *
>
> "* * On the other hand, it is not 'just and equitable' for a municipally owned utility to impose the entire burden of capital expenditures, including replacement of existing plant, on persons connecting to a water and sewer system after an arbitrarily chosen time certain." (Opinion at page 320)
>
> * * * * * * * * *
>
> "The cost of new facilities should be borne by new users to the extent new use requires new facilities, but only to that extent. When new facilities must be built in any event, looking only to new users for necessary capital gives old users a windfall at the expense of new users.
>
> * * * * * * * * *
>
> "* * The limitation on use of the funds, shown to exist *de facto* in the present case, has the effect of placing the whole burden of supplementary capitalization, including replacement of fully depreciated assets, on a class chosen arbitrarily for that purpose." (Opinion at page 321) (Emphasis by the Court)

THEREFORE, THIS COURT SHOULD CONSIDER FOLLOWING THE LAW OF THE CASE AS ENUNCIATED BY THE SUPREME COURT IN APPLICATION OF THE REFUND QUESTION. Appellees believe they are entitled to have this Court rule upon this question since it also bears upon the established principles set forth by the Supreme Court in its decision. Appellees are of the view that if this Court examines this question, it will find that refunds are required to be made.



4. This Court has held that the funds obtained from appellees may be used for "retiring bonds issued for the earlier expansion of the system." The Court has overlooked and failed to consider the fact that this is not legally possible. The provisions of the current Dunedin ordinance do *not* provide for the payment of such funds for the retirement of bonds. The present provisions of Ordinance 76-19 do not permit such payment:

> "The use of any funds previously collected under the provisions of previous ordinances, 72-26 and 72-42, codified as Section 25-71 (c) and (d), are restricted for use in accordance with the provisions contained in Sections 25-101 and 25-102 of this Article [establishing water and sewer capital expansion trust funds for impact fees.] Under no circumstances shall any funds collected *under the terms of any previous ordinance or under the terms of this Article be expended for any purpose other than extending or oversizing, separating or constructing new additions to the treatment plant or collection and interceptor systems so as to meet the increased demand which additional connections to the system create.*" (Emphasis supplied) (R 243)

THEREFORE, THIS COURT HAS OVERLOOKED AND FAILED TO CONSIDER THE FACT THAT UNDER THE VERY ORDINANCE FOUND TO BE SUFFICIENT IN THIS CAUSE BY BOTH THIS COURT AND THE LOWER COURT, THE APPELLANT MAY *NOT* UTILIZE SUCH FUNDS TO *PARTIALLY PAY* OFF THE BONDS ISSUED FOR EARLIER EXPANSION OF THE SYSTEM AS HELD BY THIS COURT ON PAGE 4 OF ITS OPINION.

The revealing of this point to the Court would seem to emphasize the fact that if a user is paying for water rates on the one hand and also is required to pay an impact fee for partial reduction of funds, he is being charged unequally for the capital facilities. The other individuals who are only paying for the capital investments through their water rates and have not paid impact fees are getting a disproportionate windfall. As stated in the Supreme Court's decision, i.e., *Contractors and Builders Association vs. City of Dunedin*, 329 So.2d 314 (Fla. 1976):

"* * On the other hand, it is not 'just and equitable' for a municipally owned utility to impose the entire burden of capital expenditures, including replacement of existing plant, on persons connecting to a water and sewer system after an arbitrarily chosen time certain.

"The cost of new facilities should be borne by new users to the extent new use requires new facilities, *but only to that extent*. When new facilities must be built in any event, looking only to new users for necessary capital gives old users a *windfall* at the expense of new users."

* * * * * * * * *

"* * The limitation on use of the funds, shown to exist *de facto* in the present case, *has the effect of placing the whole burden of supplementary capitalization, including replacement of fully depreciated assets, on a class chosen arbitrarily for that purpose.*" (Opinion at 320-321) (Emphasis supplied by underlining)

ACCORDINGLY, THE SUPREME COURT IN THE LAW OF THE CASE SPECIFICALLY FOUND, AS DID THE TRIAL JUDGE, THAT THE MANNER IN WHICH THE IMPACT FEES WERE IMPOSED UPON A PORTION OF THE PUBLIC, NAMELY APPELLEES, WITHOUT ASSESSMENT OF IMPACT FEES AS TO OTHER CITIZENS IN THE SYSTEM, SINGLED OUT APPELLEES AT A TIME "ARBITRARILY CHOSEN." The Court is requested to reconsider its position in regard to its opinion in this matter.

5. The Court has held that the case of *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338, 42 S.Ct. 325, 66 L.Ed. 647 (1921) does not apply because the drainage district in that case was without authority to exact a charge for passage of plaintiff's boats through the canal, while the City of Dunedin had authority to enact an impact fee. The Court has overlooked and failed to consider that there is *no precedent* even if the *Forbes Pioneer* case can be distinguished on this basis which holds that a municipality may retroactively, after suit is filed, enact an ordinance seizing monies or properties from its citizens. The Court in this regard has overlooked and failed to consider the case of *City of Coral Gables v. Sakolsky*, 215 So.2d 329 (Fla. 3rd D.C.A. 1968). This case involved an appeal by the City of Coral Gables from a decree declaring invalid and



unconstitutional a portion of the City's zoning ordinance. On January 5, 1965, Sakolsky had filed application for a building permit under Ordinance No. 1449 which then provided that no building or structure could exceed three stories or forty-five feet in height. Sakolsky needed an exception under the ordinance but, at a public hearing held January 26, 1965, the matter was deferred so that the Commission could have an opportunity to "provide standards, guides and qualifications" in the ordinance. Sakolsky filed suit for mandamus on February 5, 1965, to coerce the Commission into granting the application; however, apparently, this action was dismissed. On April 27, 1965, the Commission enacted Ordinance No. 1475 amending the previous ordinance prohibiting conclusively any building of an apartment more than 45 feet in height on property zoned the same as Sakolsky's. Six months after the enactment of the ordinance on October 12, 1965, Sakolsky filed suit seeking to declare the ordinance unconstitutional. One of the burning issues in this case was Sakolsky's contention that the ordinances which were in effect at the time he filed the application to the City for his zoning controlled. He contended that he was not bound by Ordinance No. 1475. The Third District disagreed and clearly ruled that the ordinance in effect at the time of the suit controls as far as the rights of a litigant are concerned.

"It is established in Florida that in law actions *'the right of a plaintiff to recover must be measured by the facts as they exist when the suit was instituted.'* Voges v. Ward, 1929, 98 Fla. 304, 123 So. 785. And the same rule applies to equity proceedings. Meredith v. Long, 1928, 96 Fla. 719, 119 So. 114. See also to the same effect Hasam Realty Corp. v. Dade County, Fla.App. 1965, 178 So.2d 747; Tomayko v. Thomas, Fla.App. 1962, 144 So.2d 335; Mutual Ben. Health & Accident Ass'n. v. Ott, 1942, 151 Fla. 185, 9 So.2d 838; and Stegemann v. Emery, 1933, 108 Fla. 672, 146 So. 650. In fact, this Court, in the per curiam majority opinion in Davidson v. City of Coral Gables, Fla. App. 1960, 119 So.2d 704, test 708, held that '* * * the law as it stands at the time of the decree, rather than at the time of application or filing of the suit, controls the decision thereon.' In the instant case, however, whether the law at the time suit is filed or the decree is entered governs, is of no consequence inasmuch as Ordinance No. 1475 was in force at both times. But Davidson is important in setting forth

the exception, not applicable here, to the general rule aforesaid, which exception we reaffirm." (Emphasis supplied)

Therefore, applied to the case at bar, the appellant's ordinance in effect at the time suit was filed determined the rights of appellees to a refund.

6. The Court has overlooked and failed to consider the fact that the Supreme Court remanded this case to the trial judge to determine "de novo" all matters including the application of the principles set forth in its opinion. Therefore, there is reasonable doubt as to the true intent of the Supreme Court in establishing the "law of the case," and accordingly, because of the substantial funds which now total over $750,000 and the rights of litigants which have been litigating for five years are at stake, THIS COURT IS REQUESTED TO CERTIFY ITS OPINION TO THE SUPREME COURT AS IT ORIGINALLY DID UPON CONSIDERATION IN THE CASE OF *CITY OF DUNEDIN V. CONTRACTORS AND BUILDERS ASSOCIATION OF PINELLAS COUNTY*, 312 So.2d 763 (Fla. 2nd D.C.A. 1975) IN ORDER THAT SUBSTANTIAL JUSTICE BE DONE IN THIS CAUSE AND THAT THE APPELLEES BE AFFORDED AN OPPORTUNITY TO HAVE THE SUPREME COURT PASS UPON THE DETERMINATION OF THIS COURT'S INTERPRETATION OF THE INTENT OF THE SUPREME COURT'S OPINION.

Respectfully submitted,
JOHN T. ALLEN, JR., P.A.
4508 Central Avenue
St. Petersburg, FL 33711
(813) 381-0126
*Attorney for Appellees*



## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Rehearing has been furnished by mail to C. ALLEN WATTS, ESQ., of Fogle, Watts, Crowther & Biernacki, P.A., P.O. Box 1167, Buies Creek, North Carolina 27506, Attorney for Appellants; J. DANA FOGLE, ESQ., 109 West Rich Avenue, P.O. Box 817, DeLand, Florida 32720, Attorney for Appellants; and JOHN G. HUBBARD, ESQ., 1960 Bay Shore Boulevard, Dunedin, Florida 33528, Attorney for Appellants, this 16th day of May, 1978.

JOHN T. ALLEN, JR.,
Attorney

**IN THE DISTRICT COURT
OF APPEAL OF THE STATE OF FLORIDA
IN AND FOR THE SECOND DISTRICT
TUESDAY, JUNE 6, 1978**

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**CASE NO. 77-1110**

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THE CITY OF DUNEDIN, FLORIDA,
a municipal corporation,
*Appellant,*
*vs.*
CONTRACTORS AND BUILDERS ASSOCIATION
OF PINELLAS COUNTY, etc., et al,
*Appellees.*

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Counsel for appellees having filed in this cause a Petition for Rehearing and the same having been considered by the Court, it is

ORDERED that said Petition be and the same is hereby denied. It is further

ORDERED that the Motion for Certification of Opinion to Supreme Court filed by counsel for appellees is hereby denied.

A TRUE COPY
TEST:
William A. Haddad
CLERK, DISTRICT COURT OF APPEAL
SECOND DISTRICT

cc: C. Allen Watts
John T. Allen, Jr.
J. Dana Fogle
John G. Hubbard



**SUPREME COURT OF FLORIDA
TUESDAY, APRIL 24, 1979**

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**CASE NO. 54,567**

**District Court of Appeal,
Second District**

**77-1110**

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CONTRACTORS AND BUILDERS ASSOCIATION
OF PINELLAS COUNTY, ETC., ET AL.,
*Petitioners,*
*vs.*
THE CITY OF DUNEDIN, ETC.,
*Respondent.*

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This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Fla. R. App. P. 9.120, and it appearing to the Court that it is without jurisdiction, it is ordered that certiorari is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

ENGLAND, C.J., BOYD, OVERTON, HATCHETT and ALDERMAN, JJ., Concur ADKINS, J., Dissents

A True Copy
TEST:

Sid J. White
Clerk Supreme Court.

By: Debbie Causseaux
Deputy Clerk

C
cc: Hon. William A. Haddad, Clerk
Hon. Harold Mullendore, Clerk
Hon. B. J. Driver, Judge

John T. Allen, Esquire
C. Allen Watts, Esquire
of Watts & Biernacki
John G. Hubbard, Esquire